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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

AND OF

SOME SPECIAL CASES ADJUDGED

IN THE

Court of King's Bench:

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WILLIAM PEERE WILLIAMS,

LATE OF GRAY'S INN, ESQ.

PUBLISHED, WITH NOTES, REFERENCES, AND TABLES OF THE NAMES OF THE CASES, AND OF THE PRINCIPAL MATTERS,

BY HIS SON,

WILLIAM PEERE WILLIAMS,

OF THE INNER TEMPLE, ESQ.

EDITED (IN 1787 *AND* 1793*) WITH ADDITIONAL REFERENCES TO THE PROCEEDINGS IN THE COURT, AND TO LATER CASES,*

BY SAMUEL COMPTON COX,

OF LINCOLN'S INN, ESQ.

NOW ONE OF THE MASTERS OF THE COURT OF CHANCERY.

THE SIXTH EDITION,

WITH REFERENCES TO THE MODERN CASES,

BY JOHN BOSCAWEN MONRO, WILLIAM LOFTUS LOWNDES, AND JAMES RANDALL,

OF LINCOLN'S INN, ESQRS. BARRISTERS AT LAW.

IN THREE VOLUMES.

VOL. III.

LONDON:

JOSEPH BUTTERWORTH AND SON, 43, FLEET STREET.

1826.

LONDON:
Printed by J. & T. Clarke,
St. John's Square.

TO

THE RIGHT HONOURABLE

ARTHUR ONSLOW, Esq.

SPEAKER OF THE HOUSE OF COMMONS,

And one of His Majesty's Most Honourable Privy Council.

SIR;—

I HAVE had very little doubt with myself, to whom I should address the following Reports. The long friendship, with which you honoured the Author of them, and the esteem shewn by you on all occasions for the Profession, might justly direct them to you as their Patron. But there remains a still stronger reason to be offered in excuse for the trouble now given you: which is, that from a comprehensive knowledge of the whole extent of our Laws, you seem to have selected such parts of them for the object of your particular attention, as are more immediately founded on the eternal rules of equity and justice.

In conformity to these rules, you will here find, Sir, the greatest lawyers our country has produced, laying aside all those distinctions and refinements, that would, in their opinion,

render the science a matter of (*a*) *memory, rather than of reason and judgment*, and employing the talents they possessed, in relieving men made unhappy by unforeseen accidents, and in detecting frauds so contrived, as to be out of the reach of the ordinary courts of judicature.

I cannot forbear observing, when I consider to whom I am applying myself, that all the eminent persons whose decisions are here contained, were of the utmost credit and influence in that respectable assembly wherein you have so remarkably long, and with such dignity, presided; that it was there they laid the foundations of their future greatness, and recommended themselves to the esteem of all good men, by happily (*b*) tempering what were before thought incompatible, the prerogative of the crown, and the liberties of the subject.

It is the remark of one of the greatest statesmen and patriots of all antiquity, that (*c*) none of a man's illustrious actions, when in office and authority, are so *appropriated* to him, as the laws which he has promoted for the benefit of the community. As a proof of this, he instances in many of his own countrymen, who, though highly distinguished on other accounts, would, he thinks, have chosen that their general character should be

---

(*a*) See the Lord *Cowper's* Argument, when he gave judgment in the cause of *Newcomen* versus *Barkham*, 2 *Vern.* 729., and the Lord *Talbot's* in that of *Cook* versus *Arnham*, *post.* 286.

(*b*) Res olim dissociabiles, Principatum ac Libertatem miscuerunt.—*Tacit. in vitâ Jul Agricolæ de Imperatoribus Nerva et Trojano.*

(*c*) Ecquid est, quod tam propriè dici possit actum ejus, qui togatus in republicâ cum potestate imperioq; versatus sit, quam lex? Quære acta Gracchi; leges Sempronie proferentur. Quære Syllæ; Corneliæ. Quid? Cnei Pompeii tertius consulatus in quibus actis constitit. Nempe in legibus. Cæsare ipso si quæreres, quidnam egisset in urbe, et in togâ? leges multas responderet se et præclaras tulisse.—*Philippic' prim'.*

determined from their merits of this kind. What national acknowledgments then can sufficiently reward the services of him who has so carefully watched over our Constitution, and been constantly engaged in promoting laws for its support and improvement!

I am,

With the greatest respect, Sir,

Your most obedient humble servant,

WM. PEERE WILLIAMS.

THE

PREFACE.

FROM the favourable reception given to the two volumes of Reports that I published some time since, I have been encouraged to let this third appear; the originals of all which the Author left written in his own hand; not without a design, as from several circumstances may be conjectured, of their being made public.

It may be proper to apprise the reader, that in the following sheets he will meet with several cases, prior in point of time, to some that are printed in the former volumes; the reason of which is, that the Author having, through some accident or other, omitted to give the final determinations of these cases, it was not judged advisable to insert them, imperfect as they then were: but the Register's books having been since searched, all defects of that kind will be found here supplied.

Sir *Edward Coke,* in the Preface to his *First Institute,* takes notice of its having been a peculiar felicity attending the judicious writer on whose book he comments, that he was cotemporary with *several famous and expert sages, from whom that work received great furtherance.* And possibly, when we call to mind those who were the ornaments of the

courts, both of law and equity, during the time of our Author's attendance, (with most of whom he was known to have had some intimacy;) the Reports now under consideration may not be thought destitute of the like advantages.

In this volume, the greatest part of which consists of cases in equity, I have taken the liberty to insert two, that were adjudged in the courts of common law, both of them on subjects of importance, but especially the latter; in which, besides the argument offered at the bar, is contained an authentic report of a resolution delivered by that excellent person, who at present presides in the highest court of judicature, and whose abilities and integrity have rendered us insensible of the loss of his immediate predecessor.

I must not conclude without adding a word or two in respect to the cases and observations placed briefly, by way of note, at the bottom of the page, and which, as they make that part of the work wherein I have been chiefly concerned, may most stand in need of an apology. All I shall say in their behalf is, that they are, except a very few, which will be too easily distinguished to their disadvantage, of the same authority with the text, (being taken from the author's manuscript) and seem to illustrate the passages to which they refer. What regard they may deserve, is entirely submitted to others.

W. P. W.

October 1, 1749.

A

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1. Bea. 393.
4. Tu. Ch. 267.

TERM. S. TRINITATIS, 1724.

16 Jur. 641.
12 — 813.

MILLS *v.* BANKS. Case 1.

Lord Chancellor MACCLESFIELD.

2 Eq. Ca. Ab. 491. pl. 4. The trust of a term is, to raise daughters' portions by rents, issues, and profits; or by making leases for three lives at the ancient rent; or by granting copyholds on fines; the money to be paid to the daughters at their age of eighteen or marriage, or as soon after as the same can be raised out of the premises as aforesaid; the portions, as it seems, may not be raised by sale or mortgage.

On the marriage of Mr. *Lutterell* with Mrs. *Mary Tregonwell*, in 1680, Mr. *Lutterell* made a settlement of his estate; and Mr. *Tregonwell*, the father of the said *Mary*, made also a settlement of *his* estate; and in the *Tregonwell* settlement there was a term raised out of the *Tregonwell* estate (being the manor of *Milton-Abbas*, in *Dorsetshire)* subsequent to several estates since determined, to the use of trustees for two hundred years, remainder to the use of the first, &c. son of the marriage in tail-male, remainders over.

The trust of the two hundred years' term was, to raise 10,000*l.* for the younger children, sons and daughters of the marriage, by rents, issues and profits, or by making leases for one, two, or three lives, or for any number of years determinable on one, two, or three lives, reserving the ancient rent; or by granting copyholds on fines; the money to be [2] paid to the daughters at their age of eighteen or marriage, and to the sons at twenty-one, or as soon after as the same could be raised out of the premises, as aforesaid. There were issue by the marriage one son and two daughters; the son died when about twenty years of age; the two daughters intermarried, the eldest with Sir *George Rook*, the youngest with Mr. *Harvey;* and he soon after dying, she married Mr. *Ash*.

MILLS v. BANKS.

In 1706, the Lord *Cowper decreed* this 10,000*l.* to be raised by sale of the trust term, and to carry interest only from the time of the decree. Mrs. *Lutterell* surviving Mr. *Lutterell*, married Sir *Jacob Banks*, by whom she had issue two sons, and died; and Sir *Jacob Banks* and the two infant sons were parties to the decree. After the making of which decree, Sir *George Rook* and his Lady being dead, and having left an infant son, and executors in trust, the executors lent 5000*l.* to Mr. *Ash* on a mortgage of this trust term for two hundred years, which mortgage was approved of by a Master, and the money placed out in pursuance of a decree that had been made in another cause touching an account of the estate of Sir *George Rook*.

And now the cause was reheard [A] before the Lord *Macclesfield;* when it was insisted in support of the *decree*, that the same being made by the Lord *Cowper*, in 1706, (eighteen years since) and so many things done in the mean time; as the lending of an infant's money, put out by a decree of this court with the approbation of the Master, and lent by executors in confidence of such decree, and, as it were, by the
[3] hands of the court, it would be very hard to *reverse* such a decree; so that if there were any difference to be found betwixt this and the case of *Ivy* v. *Gilbert*, that difference, though but a slender one, ought to be allowed, and the decree to stand. And it was much insisted, that in the principal case there was a most apparent difference; the money being by the deed appointed to be raised and paid at a certain time *(viz.)* the portions for the daughters at their age of eighteen or marriage; and though the subsequent words were, *or as soon afterwards as the same can be raised out of the premises, as aforesaid;* yet this must be still understood to mean in such time as might best answer the intent of a portion, so as that the daughters might have their money in a reasonable time to advance them, which could not be done by the yearly profits; these being so small, as not to be sufficient to pay the money in twenty years, and would rather be an *annuity* than a *portion*.

Besides, the settlement in the case of *Ivy* v. *Gilbert* was made in 1651; when the word *profits* was not taken in a

[A] Note; The decree of the Lord *Macclesfield* in the case of *Ivy* v. *Gilbert*, and which was affirmed in the *House of Lords*, (vide vol. 2. 13.) occasioned this *re-hearing*.

sense so large, as to extend to profits arising by sale: but, according to the natural and obvious import of the word, signifying the annual profits or rent of the land. And this was mentioned as one (*a*) of the reasons for the decree in that case.

(*a*) Vol. 2. 20.

Neither in the case of *Ivy* v. *Gilbert* was there any money put out with the approbation of the court, which was to be endangered by the determination then made; moreover, that was allowed on all hands to have been a hard case, and for that reason not to be extended: that the lending money on an estate *decreed* to be mortgaged or sold was not to be discountenanced; and though it might be objected, that the words of the trust of this two hundred years' term being, to [4] raise the money by rents and profits, or by leasing for three lives at the old rent, or by the granting of copyhold on fines; though it might be objected, that the word *profits* cannot here be extended to a mortgage, because the leasing is confined to three lives, and at the old rent; yet that would be of no consequence, because in conveyancing it is common to make use of many unnecessary words; for instance, to say, that the portion shall be raised by rents and profits, or by leasing, mortgaging, or selling; and yet the word *selling* implies all the rest. That in the cases of *Butler* v. *Duncomb*, (*b*) *Corbet* v. *Maidwell*, (*c*) and *Reresby* v. *Newland*, (*d*) the father or mother of the daughter was living, who, it was to be presumed, would take care of their own child; and in those cases the mortgage or sale desired for the raising of the portions was a mortgage or sale of a *reversion*. That if in answer to the length of time since the decree it should be alleged, that the said decree was against an infant, to whom no *laches* can be imputed, and who, as soon as of age, applied to be relieved against it; to this it might be replied, that as the heir of the Lady *Banks* was an infant, so was also the son of Sir *George Rook*, whose money was lent under the decree of the court, and with the approbation of the Master, upon this very term, which my Lord *Cowper* had *decreed* to be sold as aforesaid; and it is observable, that whenever an estate is decreed to be mortgaged or sold for the raising of money, infants concerned therein have not a day given them, after their attaining their age, to shew cause, neither is their infancy regarded.

(*b*) Vol. 1. 448.
(*c*) 2 Vern. 640, 655.
(*d*) Vol. 2. 93.

Lastly, With regard to the rehearing of this cause, the same was said to be a matter not of right, but merely discre-

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tionary: *the court might either grant a rehearing, or refuse it; and on this rehearing might open the decree, or deny so to do. And the diversity usually taken at this time of day is, between profits *generally* and *yearly* profits, the former extending to signify the land itself, or the profits which it will any way yield.

On the other side it was urged, that the principal case was not to be distinguished from that of *Ivy* v. *Gilbert;* that the 10,000*l.* was to be raised by rents, issues, and profits; or by leasing for three lives, or ninety-nine years determinable on three lives at the old rent; or by granting copyholds on fines; so that, though it should be admitted that the word *profits*, if left general and at large, would extend to *any* profits, as well those arising by sale or mortgage, as such as should be produced annually; yet in the present case there were terms of explanation, which restrained it to signify only *annual* profits; or else, why was the power of leasing, or granting copyholds, added? Nay, even in the way of *leasing*, the party was obliged to reserve the ancient rents; and could he that was disabled to lease for less than the ancient rent, be imagined to be intrusted with a power to sell? That supposing the trust were to raise the money by rents, issues, and profits, or by selling a moiety of the lands during the term, could it be thought that, by virtue of the word *profits*, the trustees might sell one half, and also by their express power to sell, dispose of the other half; which yet, by the construction contended for, they might do, but that this would be monstrous to the highest degree.

As to what has been objected, that the decree in the case now *re-heard* was made eighteen years since, and that money had been lent on the term decreed to be sold: no precedent [6] could be shewn, where matters happening since the decree were ever allowed to add to the strength or reason thereof; neither could arguments of compassion alter the case, which must be governed by the express words and plain intention of the trust; though, considering the great portions by which the daughters of Mrs. *Lutterell* (now Lady *Banks)* were provided for, by her former husband, and also what a charge this 10,000*l.* in question, together with the interest thereof, would bring on the inheritance and on the son and heir of the Lady *Banks*, it was most reasonable that her estate should be eased of this burden as much as possible.

That if the money had been to be raised by leasing or

granting copyholds, *and not otherwise*, there would be little question, but that the trustees, in such case, could not sell or mortgage; now here these words were plainly implied; these affirmatives manifestly inferred a negative; and this was the reason (*a*) of the decree in the case of *Butler* v. *Duncomb*. So in our law books it is the general doctrine, that affirmative statutes imply a negative. [B]

(*a*) Vol. 1. 452.

Affirmative statutes imply a negative.

Further: Where the words and intent of a settlement are plain, it is improper to argue from the inconveniences arising from such settlement; for the same settlement which ordered the payment of the portions at eighteen, or as soon after as the same could be raised by the means aforesaid, might have ordered the payment thereof at the daughters' age of forty years; the same settlement which secured to the daughters in the principal case a portion of 10,000*l.* might have given them but one thousand pounds; in which case, had they complained never so much, they could not have been relieved; or it might have provided these portions for such of the children of the marriage only as were otherwise unprovided for, or as should be unprovided for at the death of the father and mother, as in the case of *Corbet* and *Maidwell:* that the case of Sir *Willoughby Hickman* (*b*) v. Sir *Stephen Anderson* was allowed to have been an hard case upon the daughter; but there the court said, they could no more relieve her than they could make a new settlement.

[7]

(*b*) Trin. 1710. Vide 2 Vern. 655.

Lord Chancellor: The principal case in some things differs from that of *Ivy* and *Gilbert*, but not materially, and in many respects is not so hard a case as that was. It is very observable, that here in the settlement of the *Tregonwell* estate, the trust of the two hundred years' term is not said to be for raising *portions* for daughters, but only the sum of 10,000*l.* It is only the term in Mr. *Lutterell's* settlement that is for raising *portions* for daughters, and thereby the portions and maintenance are provided; so that in the case in question, none of the arguments drawn from the necessity of raising daughters' portions within a reasonable time are applicable, the money to be raised here being a *bounty* and not a *portion*.

I cannot but think it to have been a due and just resolution in the case of *Butler* v. *Duncomb*, that all trusts of

[B] See a remarkable instance of this cited by the reporter in his argument in the case of *The King* v. *Burridge*, post, 461.

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terms directing the methods of raising money imply a negative, *(viz.)* that the money should be raised by the methods prescribed, and not otherwise. [C] I admit the word *profits*, if found alone, would include a mortgage or sale: but here the subsequent clause shews, that thereby must be intended annual profits only, else such subsequent clause for raising the money by leasing or granting copyholds would be absurd. The natural meaning of the word *profits* is confined to such as are annual, though in this court on particular occasions, and to serve particular purposes, the sense thereof has been extended, unless where subsequent words were thought to abridge it: but still any one not a lawyer would understand it in the restrained sense. In the principal case it is a stretch to construe it otherwise, by reason of the subsequent clause of leasing for three lives at rack rents, and of granting copyholds. It might be as well insisted, that the trustees might make a lease for *four* lives, or for years, determinable upon the death of *four* lives; or that they might make a lease for years, reserving *less* than the old rent, as to say, that under this trust they might make a mortgage or sale of the term. And the case has been rightly put, that supposing the trust were to raise the money by rents, issues, or profits, or by sale of a moiety of the premises, there could be no question but that the word *profits* would not warrant the trustees to sell the other moiety.

[8]

It is in the discretion of the Court whether or no to grant a re-hearing.

So that I should not have made this decree, but the same having been made, and this being a re-hearing, as it is in the discretion [D] of the court whether they will grant a re-hearing, it is equally so whether they will do any thing thereon.

Moreover, when an infant's money has been lent under a decree and by the approbation of a Master; for the Court

[C] See his Lordship's opinion to this purpose, in the case of *Ivy* v. *Gilbert*, vol. 2. 19.

[D] In the case of Mr. *Onslow*, the present Speaker of the *House of Commons*, the Court, on the circumstances of the case, and the decree not being inrolled, refused to discharge an order for a rehearing, though at the distance of about twenty-four years. By Lord *King*, the last seal after Hilary Term, 1732. (1)

(1) Vide *Buck v. Fawcett*, post, 242. P. C. 152. *Houghton* v. *West*, 5 Bro. *Duchess of Hamilton* v. *Manby*, 4 Bro. P. C. 152. (*x*)

(*x*) *Pentland* v. *Stokes*, 2 Ba. & Be. 75.

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The Court will not without difficulty set aside a security made under a decree, and approved of by the Master.

[*9]

to make another decree setting aside this security would be to make the Court fight against itself and act inconsistently; all which renders it more proper to apply to a *superior Court. Again, as the Court never gives any aid against a purchaser or mortgagee without notice, this is a stronger case; for though here is notice of the settlement, here is also notice that the Court has declared and decreed that the term thereby raised, and the trusts declared concerning the same, empower the trustees to sell the premises for raising the money for the daughter of Mrs. *Lutterell;* and a power to sell implies a power to mortgage, which is a conditional sale.

Wherefore, if the defendant *Banks*, the heir-at-law of Mrs. *Lutterell*, (afterwards Lady *Banks*) would have the opinion of this Court in the case, and is for setting aside these securities, on which the money of Sir *George Rook*, now belonging to his infant son, is placed; it seems necessary for him to bring an original bill. However, I will reserve liberty for Mr. *Banks* to apply to the Court, that so he may have time to advise with his counsel what method it may be proper for him to pursue in this case, which is indeed a very extraordinary one.[E]

[E] It appears from the *Register's book*, that on the 11th of *June*, 1725, there was a petition to have back the deposit, the parties having amicably ended the matter.

41. Ch. D. 547.

DUNN *v.* GREEN.

Case 2.

Lord Chancellor MACCLESFIELD.

A. is a copyholder in tail, the lord grants the freehold of the copyhold to him in fee; the copyhold, though entailed, is extinct.

[*10]

A COPYHOLDER in tail accepted a grant from the lord of the manor of the freehold and fee-simple to him and his heirs, and died indebted by bond wherein the heirs were bound; and on a bill brought by the bond-creditor for satisfaction out of the assets left by the obligor; the question was, whether the premises were assets by descent, and liable to the bond?

*The Lord Chancellor, after time taken to consider of it, thus delivered his opinion.

Unless it be expressly found that the custom of the manor allows of entails, then this is a fee conditional, and plainly merged by the grant of the freehold in fee: but supposing the custom of the manor *does* warrant entails, yet the copyhold is extinguished; because in the eye of the law, that is

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but an estate at will, and must be merged by the grant of the freehold. The premises by such grant are severed from the manor; consequently, the custom of the manor cannot corroborate the legal estate at will. The copyholder cannot hold of himself; and the copyhold, though entailed, is swallowed up [F] in the greater estate of the freehold; and as the tenant, after such time as he took the grant, did not himself continue a copyholder, so his son, on the descent of the freehold, is likewise no copyholder, which may be said from son to son *ad infinitum*. Moreover, if the entail of the copyhold be not extinguished, it will be a *perpetuity*, since the only proper way of (1) barring the entail of a copyhold, is

[F] See 2 Chan. Rep. 174. and 1 Vern. 393, 458, *Parker* v. *Turner*, where the Lord Chancellor *Jefferys* delivered the like opinion in the like case. *Quære autem*, If *A.* be a copyholder in tail, remainder to *B.* in fee, and *A.* takes a grant of the freehold from the lord to him and his heirs, and dies without issue; is not *B.*, in whom there was once a vested remainder in fee of the copyhold premises, entitled to the same?

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(1) It has been since determined that where the custom does not prescribe any particular mode of barring the entail of a copyhold, a surrender (although only to the use of the will) will be sufficient for that purpose without a custom. *Carr* v. *Singer*, 2 Vez. 603. *Moore* v. *Moore*, 2 Vez. 596. But a custom to bar by surrender may be *concurrent* with a custom to bar by recovery. *Everall* v. *Smalley*, 1 Wils. 26, *and* 2 Stra. 1197. S. C. *Doe* v. *Truby*, 2 Bla. Rep. 944. (*x*) With respect to the quære made in the note above, it seems that the remainder-man could have no *equity* against the tenant in tail, (who had *power* to bar the remainder by one mode or the other) upon the principle of *Cann* v. *Cann*, 1 Vern. 480.(*y*) So in *Blake* v. *Blake*, before the Court of Exchequer, *July* 18th 1786, *Robert Blake* the elder devised a lease for three lives holden of the Bishop of *Bath* and *Wells*, in trust for his son *Robert Blake* the younger and the heirs male of his body, and in case he should die without issue, for the plaintiff (his other son) in like manner. *Robert Blake* the son surrendered the old lease, and took a new lease for three lives, to him and his heirs, all which was done without the concurrence of the trustees under the will. *Robert Blake* the son died without issue, having by will disposed of the said lease. The bill was filed to have the benefit of the new lease, insisting, that the surrender of the old lease and the taking of the new one were not sufficient to bar the limitation to the plaintiff under the father's will, and that those claiming under *Robert* the son ought to be declared trustees of the new lease for the plaintiff.—But the Court was of opinion, that *Robert* the son being *tenant in tail*, a Court of Equity could not have called upon him to have declared such a trust in his lifetime, and that there was no stronger equity against his representatives; and dismissed the bill. (*z*)

(*x*) *Doe* v. *Ossingbrooke*, 2 Bing. 70.

(*y*) So *Challoner* v. *Murhall*, 2 Ves. Jun. 524. *Fletcher* v. *Tollet*, 5 Ves. 3.

(*z*) 1 Cox. 266. *Blake* v. *Luxton*, Coop. 178. S. C. 6 T. R. 289, and S. C. stated in *Campbell* v. *Sandys*, 1 Sch. & Lef. 294, and see *Lloyd* v. *Johnes*, 9 Ves. 63.

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by recovery in the Lord's Court; but after such severance as in the present case, no recovery can be suffered in the Lord's Court.

One binds himself and his heirs by a bond, and mortgages some lands of which he is seised in fee for more than the value; his heir has 200*l.* for joining in a sale of the premises; this 200*l.* held not to be assets.

Another point in this case was, that the obligor in the bond (the satisfaction whereof was sought by this * suit) had in his life time made a mortgage of some lands of which he was seised in fee, for more than the value; and the mortgagee offering the lands in sale, the purchaser would not proceed, unless the heir of the mortgagor (who was also heir of the obligor) would join in the conveyance, and the heir had 200*l.* of the mortgage money for joining; whereupon the question was, whether this 200*l.* was assets?

Lord Chancellor: This is not assets, having been paid to buy off the obstinacy of the heir, and not for the value of his equity, which was worth nothing.

[*11]

ADAMS *v.* PEIRCE.

Case 3.

Lord Chancellor MACCLESFIELD.

ONE *Adams*, possessed of some leasehold and other personal estate, had a son and two daughters; and by his will gave to the value of about 2000*l.* a-piece to his two daughters, and devised several leasehold estates to his son; and, if his son should die within age, then the premises devised to his son to go to his daughters. The residue of his estate the testator bequeathed to his daughters, and made his brother the plaintiff executor.

The eldest daughter married the defendant, Dr. *Peirce*, who before marriage settled a ground rent of 99*l.* *per annum* on his intended wife and her issue in strict settlement, and also settled 1000*l.* part of the wife's portion.

The second daughter married a freeman of *London;* and before the marriage the executor, with the consent of the intended husband, assigned over good part of the portion to trustees for her separate use, and to be at her separate disposal.

[12]

Both the daughters and also the son were infants; and the son having by assent of the executor entered on the leasehold premises, died during his infancy, whereby a considerable personal estate (to the amount of about 4000*l.*) came to the two daughters.

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The plaintiff, the executor in trust, brought this bill to pass his own accounts; and that the two husbands, in consideration of the increase of their wives' portions, might make additional settlements; especially the citizen, who out of his own estate had made no settlement before.

Lord Chancellor: The executor is here plaintiff, and not the husbands; if the latter had asked any aid in equity, the Court would have refused granting it but on such terms as should appear reasonable.

Where a term for years is devised to A. for life, remainder to B., and the executor assents to the devise to A., this is a good assent to the devise over.

But the executor having assented to the legacy of the leasehold estates to the son, this is an assent likewise to the devise (*a*) over to the daughters, who have thereby gained a legal interest in such leasehold estates, which I cannot take from them, nor divest them of what is already vested in them by act of law.

(*a*) Off. Exec. Oct. Ed. 234.

If money be devised to an infant daughter who marries, the court may refuse helping the husband to the money, unless he makes a suitable settlement.

[*13]

Indeed, with regard to such part of the estate as consists in money, the executor being but a trustee thereof for the wives, the Court can choose whether they will let the husbands have the money without making a * suitable settlement upon their wives; but the defendant, Dr. *Peirce,* having made a settlement before marriage, and being a person eminent in his profession as a clergyman, and possessed of great preferments in the church, let him take the money due to his wife.

Though, if the portion be small, and the husband a freeman of London, the custom of London is a suitable provision.

Also as to the other husband; he being a linen-draper in *Cornhill,* a man of great dealings, and in a thriving way; the provision which his wife will be entitled to by the custom of *London* is a good provision; and the money coming to the husbands, exclusive of the leasehold estates already vested in them by the executor's having assented to the legacy, being but inconsiderable, it is not worth while to settle that. Therefore let the executor account with the husbands, and have his costs to this time, reserving all subsequent costs.(1)

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(1) Vide *Jacobson* v. *Williams,* ante, 1 vol. 458. *Milner* v. *Colmer,* ante, 1 vol. 382. *Bosvil* v. *Brander,* ante, 2 vol. 639.

EYRE'S CASE, TRIN. 1726.

Case 4.

Lord Chancellor KING.

BY marriage articles money was laid out on securities, and agreed to be invested in land, and settled on the husband for life, remainder to the wife for life, remainder to the first, &c. son of the marriage in tail male, remainder to the right heirs of the husband. The husband and wife died, leaving only one son, who being come of age petitioned the Lord Chancellor, that in regard if the lands were purchased, he would, as the only issue, be intitled to the purchased premises, remainder to himself in fee, as heir to his father; and since a fine only would enable him to dispose of the premises, which fine might be levied as well in vacation as in term: for these reasons the petitioner applied for an order, that the * money should be paid to him, agreeably to what had been done by the Lord *Parker* in the case of (*a*) *Short* v. *Wood*, and in many others of the like nature; for that it would be a vain thing for the court to enforce the making of a settlement, which, as soon as made, might immediately be defeated. Otherwise, had there been a remainder to a third person, as in such case the settlement could not be defeated without a recovery, and the same not being to be suffered but in term, (before which the tenant in tail might die) therefore the court has been tender of taking away such chance from the remainderman.

2 Eq. Ca. Ab. 42. pl. 4. Money is articled to be invested in a purchase; and to be settled on A. in tail, remainder to A. in fee. A. has neither wife nor issue, and might by a fine only dispose of the lands if settled; yet the court will not order the money to be paid to A. *a fortiori* they would not, if there were either wife or issue: but see the note.

[*14]

(*a*) Vol. 1. 471.

Lord Chancellor: I cannot see why I should not have the like regard for the issue in tail, as for the remainderman: it is possible the son (the petitioner) in this case, before he can light on a purchase, and settle it, may die, leaving issue; and this is a chance of which I would not deprive such issue. Also here may be a wife whom I may hinder of her dower. And though Mr. Solicitor General *Talbot* pressed this matter with some earnestness for the petitioner, the Lord Chancellor declared he could not do it, until he should be better satisfied from precedents [G].

[G] Afterwards, in the case of Mr. *Onslow* (cited in that of *Mills* v. *Banks*, ant' 8.) the Lord *King* declared his perseverance in opinion as to this point, observing, that the levying of a fine is a thing of time, there being several offices to pass; and the writ of covenant is to be under the great seal. All which impediments, not being to be removed in an instant, the tenant in tail may by them be prevented from perfecting a fine, though never so much intended by

him. But yet after all, the present practice conforms (1) to the Lord *Parker's* opinion: nay, if a feme covert is interested in the money articled to be laid out in land and settled, her coming into court, and consenting, will be (2) sufficient to dispose of such her interest. As to the objection made by the Lord *King* in the principal case, that by this means a wife might be hindered of her dower; if the party applying for the money were married, it would, without doubt, be expected that his wife should appear in court, and give her consent thereto.

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(1) Vide *Benson* v. *Benson*, ante, 1 vol. 131. *Short* v. *Wood*, ante, 1 vol. 471. *Edwards* v. Countess of *Warwick*, ante, 2 vol. 173. *Trafford* v. *Boehm*, 3 Atk. 447. *Cunningham* v. *Moody*, 1 Vez. 176.

(2) *Cunningham* v. *Moody*, 1 Vez. 176. *Oldham* v. *Hughes*, 2 Atk. 453.

DE [15]

TERM. S. MICHAELIS, 1727.

Dame Susannah Lewin, a Lunatic, Widow of Sir William Lewin, deceased, by her Committee } Plaintiff;

George Lewin, Esq; . . . . . Defendant.

Case 5.

Lord Chancellor KING.

SIR *William Lewin*, a freeman of *London*, left a wife [a lunatic] and no issue, and left his cousin, *George Lewin*, his executor. The question was, whether in case a freeman before marriage makes a settlement of part of his personal estate upon his intended wife, this bars her of her customary part? And at the hearing, the late Lords Commissioners sent it to the lord mayor and aldermen to certify what the custom of *London* was in this case. On the 29th of *March*, 1726, the court of lord mayor and aldermen having heard counsel on both sides, certified, that they did not find there was any custom of the said city, by which a woman, who before her marriage with a freeman thereof accepts of a settlement upon her of part of her husband's personal estate, to take effect after her husband's death in case she shall survive him, (without taking notice of the custom of *London*) is or is not barred of a customary part of his personal estate; and therefore they submitted the same to the determination of the court.

Sel. Ca. in Cha. 14.
1 Eq. Ca. Ab. 159. pl. 6.
A freeman of London before marriage settles some part of his personal estate upon his intended wife, to take effect after his death, without mentioning it to be in bar of her customary part; this will bar her of such customary part.

[16]

The question sent to the court of aldermen to be determined being thus returned to the court of chancery, the Lord Chancellor *King* ordered the return to be quashed for uncertainty; and that the lord mayor and aldermen should certify a direct answer to the question, affirmative or negative. On the 11th of *April* last the court of lord mayor and aldermen certified, that having inspected some further precedents, which they were not apprized of before, they did find, that if a woman before her marriage with a freeman of *London* accepts of

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a settlement upon her, to take effect after her husband's death in case she survives him, of part of his personal estate, (without taking notice of the custom of *London*) she *is* thereby barred of her customary part of his personal estate.

It is sufficient if the custom of London be certified by the recorder at the bar *ore tenus*.

And now it was objected, that this return ought not to be received, because not *signed* by the recorder; and that it was reasonable, where properties of so great value, as those which the citizens of *London* possess, are to be determined, that the returns should be with the most precise and exact certainty. Now one might be prevailed on to say by *parol*, what the same person would not venture to give under his hand.

To which it was answered, that in the precedents in *Rastal* 143. and in *Cro. Car.* 361. *The King* v. *Bagshaw*, both

[17]

which are certificates of the mayor and aldermen, the [A] recorder makes this return *ore tenus, et non aliter;* and so likewise is the opinion in *Salk.* 192. the mayor of *Thetford*'s case, where *Holt* Chief Justice says, that at common law no officer was bound to sign a return; and the statute of (*a*) *York* obliges a *sheriff* to do it, but does not extend to *mayors, coroners*, or *other officers*.

(*a*) 12 Ed. 2. c. 5.

Lord Chancellor: The recorder is not bound to sign this return, but did formerly come to the bar in person, and pronounce it *ore tenus*, and the *mayor* or *recorder* is not within the *statute of York:* so that the return is well enough. The reason of the custom in the present case seems to be, for that the wife does not here trust to the custom of the city of *London* for her provision. Whereupon the Lord Chancellor declared, that the wife was in this case barred of her customary part.

The precedents produced on this occasion (and the first a very remarkable one in respect of its consequences) were as follow:

Lib. de antiquis legibus, 30 H. 3. Anno 1246, de dotibus mulierum London.' Eodem anno die lunæ prox' prius hokeday [B] *adjudicat' fuit in Guildhall, quod mulier certâ et specificatâ dote dotata, non potest nec debet amplius habere de*

[A] But note; if the certificate be false, an action lies against the mayor and aldermen, and not against the recorder; for it is their certificate by the recorder. *Hob.* 87. *Day* v. *Savage.*

[B] The first of *August: Hoketide, Hockday* or *Hoctide* (cædes) diem observatum tradunt in memoriam omnium Danorum ea die clanculò et simul, in Angliâ ubi tum dominabantur, à mulieribus ferè occisorum. Vide *Spelman's* Glossary, Verbo *Hocday, et Junii* Etymologicum Anglicanum.

catallis viri sui defuncti, quam certam et specificat' dotem sibi assignat' nisi de voluntate viri sui. Hoc autem contingebat per Margaretam relictam Johannis Vyel senioris, quæ petebat in hustings London' tertiam partem catallorum dicti viri sui per multimoda brevia domini regis.

[18]

Will' Vyel et Nich' Batt vic' eodem anno die lunæ prius ad vincula sancti Petri, accessit Henricus de Baye justiciarius domino rege emissus, apud sanctum Martin' Magnum, ad audiend' recordum quod dat' fuit per querimoniam Margaretæ Vyel, die lunæ prius hokeday anno precedenti, sicut in hoc rotulo prenotatur. De quo judicio dicta Margareta conquesta fuit domino regi, et invenerat plegios ad proband' illud esse falsum unde quer'. Ibidem coram majore et civibus perlecto illo recordo, ac universis brevibus domini regis, quæ dicta Margareta impetiverat, lectis et auditis, dixit justiciarius: "Ego non dico quod judicium istud sit falsum, sed debilis "est processus ill', cum nulla fit mentio in recordo isto de "summonitione adversariorum dictæ Margaretæ, et cum Jo- "hannes Vyel vir illius fecit testamentum, non pertinebat ad "vestram curiam, tale placitum terminare." Cives responderunt, non fuit necesse ad illos summonend' qui bona defuncti habuerint, cum ipsi semper prompti fuer' offerent' se stare ad rectum dictæ Margaretæ in curia nostra, et tandem potuimus illud placitum terminare per assensum dictar' partium nihil calumniantium, et petentium fore ecclesiasticum, et sicut dominus rex nobis per breve suum illud terminare precepit. Tandem, multis altercationibus inter justiciar' et cives factis, dixit justiciarius, quod ostenderet illa omnia domino regi et concilio suo, et sic recesserunt. Postea, *ac solummodo de causa illa* [C], cepit dominus rex civitatem in manu sua, et commisit eam per breve suum Will'o de Haverille et Edr'o de Westm' ad custodiend' salv' in vigil' sci' Bartholomæi; unde major et cives accesserunt ad regem apud Woodstock, ostendentes ei quod nihil deliquerant, et non potuerunt gratiam ejus impetrare. Quare, in adventu eorum apud London, predictus Will'us de Haverille cepit sacram' de cleric' et de universis servientibus qui pertinebant ad vicecomites, ut essent attendent' ei, majore et vicecom' balliva sua sic amotis. Postea, in die dominica ante festum sanctæ Mariæ receperunt major et vicecom' in manibus suis per licentiam regis, et dies

[19]

[C] In the margin of this entry there is a note, observing it to have been usual for this unhappy prince to seize the liberties of the city into his hands.

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datus est ad respondend' de prædicto judicio coram rege et baronibus suis in crastino translationis sci' Edr'i apud West'.

From the Common Serjeant's Office.

8th Oct. 1688. *Robert Handcock*, a freeman of *London*, died, and an inventory was exhibited of his estate, one moiety whereof, which otherwise would have belonged to his widow, was by the custom to be divided amongst his four unadvanced children; for that the testator did covenant before his marriage to leave his wife 1000*l.* which is made a debt in the inventory, and allowed out of his whole estate.

9th April, 1719. An inventory was taken of the estate of *Thomas Cook*, a freeman of *London*, and a moiety of the said estate divided among the children; for that the widow was provided for by articles of agreement before marriage.

21st Nov. 1721. An inventory was taken of the estate of *John Slaney*, and the widow's part thereof was by the custom divided amongst the orphans, the widow being provided for by the settlement [D].

[D] It is to be observed, that questions touching the custom of *London* will, for the future, happen less frequently than heretofore; it being enacted by 11 *Geo.* 1. *cap.* 18. "That it shall be lawful for all persons who, after the 1st of "*June* 1725, shall become free of the city of *London*, and for all who at that "time shall be unmarried, and not have issue by any former marriage, to dispose "of their personal estate." *Sect.* 17.

"But if any person who shall be free of the city hath agreed or shall agree "by writing, in consideration of marriage or otherwise, that his personal estate "shall be distributed according to the custom of the city; or in case any person "so free shall die intestate, his personal estate shall be subject to the custom." *Sect.* 18.

1. Tu Hee. 652.
2. Rus. Hu. 227.
3. Tu. Hee. 264.
5. Tu Hu. 129.

Case 6.

CRUSE ET AL'. *v.* BARLEY AND BANSON.

Sir JOSEPH JEKYLL, Master of the Rolls.

WILLIAM BANSON seised in fee of some freehold and also of some copyhold lands, which he had surrendered to the use of his will, and being very much indebted by mortgages, bonds, and simple contract, and having a wife and five children, (*viz.*) *Christopher*, *Erith*, *Elizabeth*, *Mary*, and *Cecil*; by will dated the 17th of *January* 1724, devised all his freehold and copyhold lands to the defendant *Barley* and his heirs, in trust to sell the same for the best price he could get, and in

2 Eq. Ca. Ab. 543. pl. 15. One has two sons A. and B. and three daughters, and devises his lands to be sold to pay his debts; and as to the monies arising by sale after debts paid, he gives 200*l.* thereout to his eldest son A. at twenty-one, the residue to his four younger children equally. A. the eldest dies before twenty-one, this 200*l.* shall go to the heir of the testator.

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the first place to pay off all incumbrances upon the premises, and also all his just debts. He devised also his personal estate to the same trustee, in trust to sell to the best advantage, and after the testator's debts paid, to apply the money arising by sale of the personal estate, and also the *money* to be produced by sale of the real estate, amongst his five children, in manner thereinafter mentioned, (*viz.*) to the testator's eldest son *Christopher Banson*, 200*l.* which the testator gave him *at his age of twenty-one;* all the rest and residue thereof to and amongst his four younger children *Erith*, *Elizabeth*, *Mary*, and *Cecil*, share and share alike, at their respective ages of twenty-one, or days of marriage, which should first happen; and if any of his four younger children should die before such age, or marriage, his or her share to go to the survivors. The testator gave an express legacy to the said defendant *Barley*, whom he also left sole executor and died. *Barley* [21] the executor renounced, and the widow of the testator took out administration with the will annexed. *Christopher Banson* died under twenty-one, without having been ever married. The debts of the testator were considerable, and the estate small; and the bill was brought by the creditors against *Cecil*, the only surviving son and heir at law of the testator, to prove the will in equity, and to have a decree for sale of the estate.

Hereupon the only question was, what should become of the 200*l.* given by the will to *Christopher at his age* of twenty-one? It was admitted on all sides, and also by the court, that this 200*l.* did never vest in *Christopher*, it being by the will given to him *at his age* of twenty-one, and not (*a*) *payable* at his age of twenty-one; so that the age was annexed to the *gift*, and not (1) to the *time of payment;* consequently, it was not an interest transmissible to the executor or administrator of the said *Christopher*.

(*a*) Vide 2 Vent. 342. Clobery's case, Swinb. 311. 314. Off. Exec. cap. 19. p. 347. 1 Lev. 277. Dyer 59 b. Salk. 415.

But then the *Master of the Rolls* inclined to think, that it would not go to the younger children; because only *the residue* of the money arising by sale is given to them, which seemed to have excluded the 200*l.* legacy, so that his present opinion was, that this 200*l.* belonged to the heir.

Against which it was objected, *first*, that by this will all was made personal estate, and no real estate left to descend; and therefore in the bequeathing part it is said, that as to the *money* to be produced by the sale, *&c.* the testator disposes

(1) Vide Duke of *Chandos* v. *Talbot*, ante, Vol. II. 612.

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thereof in manner thereinafter mentioned, (*viz.*) 200*l.* to his eldest son **Christopher* at his age of twenty-one. It is true, where an estate is devised to be sold to pay debts, if there be a surplus, it shall go to the testator's heir at law: forasmuch as when the debts are paid, the trust is satisfied, and the motive of the testator for sale of the estate at an end; and the heir if he pleases, on laying down the money for the debts, may take the estate himself: so that in all those cases there is a resulting trust for the heir. But in the principal case the surplus of the money arising by sale of the lands, and also of the personal estate, is by express words given to the younger children, who in this respect are the *hæredes facti;* and the 200*l.* shall rather fall into the *residuum*, and belong to all the younger children as *hæredes facti*, than to the only surviving son. *Secondly*, For that if *Christopher* the eldest son and legatee of this 200*l.* had died in the life of the testator, there could have been no doubt but that this had been a lapsed legacy, and would have fallen into the *residuum;* now in the present case, in regard *Christopher* the legatee died before his age of twenty-one, and consequently before the legacy ever vested in him, it was as if it had been a lapsed legacy, and within the same reason. *Thirdly*, Because if this 200*l.* should belong and descend to the heir, it would, in case *he* should die before the receipt of the money, descend to *his* heir, which would give the money a descendible quality like land.

The *Master of the Rolls* ordered precedents to be looked into, saying, he would consider of it; and at length declared his opinion, that the 200*l.* should be construed as land, and descend to the heir; for that it was the same (1) as if so

(1) The several cases on this subject seem to depend upon this question, whether the testator meant to give to the produce of the real estate the quality of personalty *to all intents*, or only so far as respected the *particular purposes* of the will: for unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty *for the purposes of the will*, but further that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death, (whether from the silence or the inefficacy of the will itself, or from subsequent lapse,) will result to the heir. *Randall* v. *Bookey*, Pre. Cha. 162. *Emblyn* v. *Freeman*, Pre. Cha. 541. *Cruse* v. *Barley*, sup. *Stonehouse* v. *Evelyn*, post. 252. *Arnold* v. *Chapman*, 1 Vez. 108. *Digby* v. *Legard*, before Lord *Bathurst*, Trin. Term, 1774, where *E. B.* devised her real and personal estate to trustees, in trust, to sell, to pay debts and legacies, and to pay the residue to five persons to be equally divided between them,

much land as was of the value of 200*l.* was not directed to be sold, but suffered to descend. Wherefore the Register was directed to enter the decree accordingly (1).

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share and share alike; one of the residuary legatees died in the lifetime of the testatrix; the court at the hearing, and afterwards upon a rehearing, held that this was a resulting trust, as to the share in the real estate of the residuary legatee who died in the testatrix's lifetime, for the benefit of the heir at law. Reg. Lib. A. 1773. fol. 495. and 1774, fol. 325.—*Akeroid* v. *Smithson*, before Lord *Thurlow*, *March* 4th, 1780. *Christopher Holdsworth* by will gave several pecuniary legacies, and then devised all his real and personal estate to trustees in trust to sell the same and to convert the same and every part thereof into ready money, and out of the produce to pay his debts and the abovementioned legacies, and to pay the surplus, (if any) unto the said several legatees in proportion to their respective legacies. Two of the legatees died in the lifetime of the testator: Lord *Chancellor* approved of the case of *Digby* v. *Legard*, and declared that the shares in the real estate of the two residuary legatees who died in the testator's lifetime, resulted to the heir at law. Reg. Lib. A. 1779. fol. 668. and 1 Bro. C. C. 503. S. C. *Robinson* v. *Taylor*, 2 Bro. C. C. 589. *Spink* v. *Lewis*, 3 Bro. C. C. 355.(*x*) The only case which appears inconsistent with these decisions, is that of *Ogle* v. *Cook*, cited 1 Bro. C. C. 501.(*y*) In the cases of *Mallabar* v. *Mallabar*, Ca. temp. Tal. 79, and *Durour* v. *Motteux*, 1 Vez. 320, the question was between the heir at law and *the residuary legatee* of the personal estate, (and not the *next of kin*,) and in those cases the court was of opinion, that upon the construction of the will the real estate was converted into personalty for all the *purposes of the will including the residuary bequest*:(*z*) these cases consequently do not decide the question, which would have arisen, if there had been no residuary disposition, or if such residuary disposition had been confined to what was personalty at the testator's death.—But notwithstanding that such interest results to the heir, as being a part of the produce of the *real* estate undisposed of, it may yet be *personal* estate of the *heir*, and pass as such by a residuary bequest. *Hewitt* v. *Wright*, 1 Bro. C. C. 90.(*w*) Another branch of cases are those in which the question has arisen between *the real and personal representatives* of devisees under wills of the nature abovementioned. Vide *Scudamore* v. *Scudamore*, Pre. Cha. 543. *Flanagan* v. *Flanagan*, (cited) 1 Bro. C. C. 513. *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497.(*v*)

(1) Reg. Lib. A. 1727. fol. 227.

(*x*) *Yates* v. *Compton*, ante, 2 vol. 308. *Chitty* v. *Parker*, 2 Ves. J. 271. *Ripley* v. *Waterworth*, 7 Ves. 425. *Williams* v. *Coade*, 10 Ves. 500. *Ashby* v. *Palmer*, 1 Mer. 296. *Smith* v. *Claxton*, 4 Mad. 484. *Walker* v. *Main*, 1 J. and W. 1. *Jones* v. *Mitchell*, 1 S. and S. 290. *Tregonwell* v. *Sydenham*, 3 Dow. 203.

(*y*) But in *Collins* v. *Wakeman*, 2 Ves. J. 686. the Lord Chancellor says, with reference to the case of *Ogle* v. *Cook*, that he has had the Register's book examined, and it does not stand in contradiction to the other cases.

(*z*) *Kennell* v. *Abbott*, 4 Ves. 802. *Sheddon* v. *Goodrich*, 8 Ves. 481. *Brown* v. *Bigg*, 7 Ves. 279. *Ripley* v. *Waterworth*, ub. sup. *Wilson* v. *Major*, 11 Ves. 205. *Wright* v. *Wright*, 16 Ves. 188. *Kellett* v. *Kellett*, 1 Ba. and Be. 533. *Smith* v. *Claxton*, ub. sup. *Jones* v. *Mitchell*, ub. sup.

(*w*) *Wright* v. *Wright*, ub. sup. *Ashby* v. *Palmer*, ub. sup. *Smith* v. *Claxton*, ub. sup.

(*v*) See *Edwards* v. *Warwick*, ante, 2 vol. 175.

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TERM. S. HILARII, 1729.

Case 7.

HORSEY'S CASE.

Lord Chancellor KING.

2 Eq. Ca. Abr. 110. pl. 4. 126. pl. 9, 10. Fitzgib. 283.

On a joint commission against two partners bankrupts, the separate creditors, though they have taken out separate commissions, shall yet be at liberty to come in to oppose the allowing of the certificate.

A. and *B.*, joint partners in trade, became bankrupts, and the joint creditors took out a commission of bankruptcy against them, and the separate creditors of *A.* and *B.* took out separate commissions against them respectively. And now the separate creditors, though they had sued out separate commissions, yet petitioned the Lord Chancellor to be admitted upon the joint commission to come in as creditors to prove their debts; insisting, that unless they should prove their debts on the joint commission, they could not oppose the allowing this certificate; and yet, if *A.* and *B.*, the bankrupts, should have their certificates allowed, though on such joint commission, this would discharge all their debts, as well separate as joint; and that it would be a most unreasonable thing for creditors to be bound by that certificate which they had no opportunity of opposing: whereas, [24] though they should be suffered to come in as creditors to prove their debts, in order to oppose the allowance of the certificate, it might still be another question how far they should be entitled to a satisfaction on the joint commission: and they cited the case of one *Stevens*,(*a*) where a petition of this kind was granted.

(*a*) Jan. 5th, 1728.

On the other side the principal case was said to differ from that of *Stevens;* because here the separate creditors had taken out separate commissions, which had not been done in the case cited, and by their taking out such commissions, had elected to have their satisfaction out of the separate estate and effects of each bankrupt; and though it were so that the persons of the bankrupts should be discharged by the allowance of their certificate on the joint commission, (as it was most reasonable they should when they had given up all they had in the world,) yet their effects would not be

HORSEY'S Case.

discharged thereby, but the legal property thereof would be vested and continue vested in the assignees.

Lord Chancellor:—It seems that the separate debts will be [A] discharged by the allowance of the certificate on the joint commission; and if so, what remedy * can there then be for them? It is plain that the joint effects of *A.* and *B.* partners, are liable to the debts or bankruptcy of one of the partners, as to a moiety of these effects: as if *A.* and *B.* are jointenants of a term for years, and *J. S.* has a judgment against *A.* only, yet a moiety of the term may be taken in execution on such judgment. But I am not as yet resolved what to do in the principal case, which must be adjourned over, in order to see precedents and what directions have been given in like cases. After which his Lordship(*a*) ordered, that the separate creditors should be at liberty to oppose the allowance of the certificate; and with regard to their satisfaction, that the partnership creditors should be preferred out of the partnership stock before the separate creditors; but that, if after all the partnership creditors were paid, there should be a surplus, then the separate creditors to come in for a satisfaction thereout, *viz.* the creditors of each out of a moiety of such surplus.(1)

Where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate, this will bar as well their separate as their joint creditors.

[*25]

On a joint commission, the joint creditors are first to come in on the partnership effects; and if there remain a surplus, then the separate creditors are to be admitted.

(*a*) 22d April, 1729.

[A] So on the other hand if there be two partners, and one of them becomes a bankrupt, and on a separate commission being sued out against him, his certificate is allowed; this does not only discharge the bankrupt of what he owed *separately*, but also of what he owed *jointly, and on the partnership account:* because by the act of parliament, the bankrupt, upon making a full discovery and obtaining his certificate, is to be discharged of *all his debts.* Now the debts he owes jointly with another, are equally his debts as what he owes on his separate account; consequently, he is to be discharged of both his joint and separate debts. And so it has been determined by the Judges of *B. R.* By the Lord Chancellor *Parker*, ex parte *Yale*, 3 *July*, 1721.(*x*)

(1) Vide Ex parte *Cook*, ante 2 vol. 500. and Mos. 80. S. C. *Wickes* v. *Strahan*, 2 Stra. 1157. *Twiss* v. *Massey*, 1 Atk. 67, *&c.* In the matter of *Simpsons*, 1 Atk. 138. Ex parte *Rowlandson*, post. 405. *Hankey* v. *Garratt*, 3 Bro. C. C. 457.(*y*)

(*x*) By the 6 Geo. 4. c. 16. s. 62. joint creditors may prove under separate commissions for the purpose of voting in the choice of assignees, and assenting to or dissenting from the certificate, but are not to receive a dividend until the separate creditors are paid in full.

(*y*) See the order in Bankruptcy of March 8th, 1794, 2 Cooke's B. L. 284. and *Taylor* v. *Fields*, 4 Ves. 396. 15 Ves. 559.

HENRY DAVIS *v.* HENRY GIBBS, Administrator of Elizabeth Gibbs.

In Domo Procerum, *Hilary Vacation*, 1729.

Case 8.

Mos. 269. 2 Eq. Ca. Ab. 326. pl. 34, 35. Fitzgib. 116.
One seised of lands in fee in *A.* and possessed of a term for years in *B.* devises all his lands, tenements and real estate in *A.* and *B.* to *J. S.* and his heirs; this will not pass the term, especially if there be another clause in the will which disposes of the personal estate.

8. Ch. D. 68.

The Lady *Boreman*, being seised of lands in *Kent*, and possessed of a mortgage for years of the manor of *Cranbroke* in *Essex*, and of an extended interest upon a statute of the manor of *Bow Brickhill* in *Bucks*, by her will dated the 20th of *March* 1699, in a former clause thereof devised all her manors, messuages, lands, tenements, hereditaments, and *real estate* whatsoever in *Kent*, *Essex*, *Bucks*, *Bedfordshire*, or elsewhere within the kingdom of *England*, of which she was any way *seised or entitled* to, unto her nephew *Henry Davis* the appellant, and to her niece *Elizabeth* (the wife of the respondent *Gibbs*) for their lives equally, share and share alike; and after their decease, then the testatrix devised her said real estate to the right heirs of her said nephew *Henry Davis* (the appellant) and of her said niece *Elizabeth Gibbs*, equally in equal parts, to hold to them and their heirs, as tenants in common.

Afterwards, by a latter clause, the testatrix, after several legacies, gave all the rest, residue, and remainder of her personal estate, plate, gold, *&c.* and all her *mortgages, bonds, specialties and credits*, whatsoever they should consist of, after her debts and legacies paid, unto her said nephew *Henry Davis* and her said niece *Elizabeth Gibbs*, equally
[27] to be divided between them; and made her nephew and niece executors, and died. *Elizabeth Gibbs* died without issue, and her husband the respondent *Henry Gibbs* was her administrator, and her brother the said *Henry Davis* her heir at law. The testatrix, the Lady *Boreman*, was seised in fee of lands in *Kent*, but had only a chattel interest in *Cranbroke* in *Essex*, and in *Bow Brickhill* in *Bucks*.

The question was, whether by this devise *Henry Davis*, as brother and *heir* of his sister *Elizabeth Gibbs*, was entitled to the said *Elizabeth's* moiety of the chattel interests in the lands in *Essex* and *Bucks*, by way of executory devise (as supposed to be devised to the said *Elizabeth Gibbs* for her life, remainder to her heirs,) or whether the said moiety,

after the death of the said *Elizabeth*, should go to her husband as her administrator? And it was decreed (*a*) by the Lord Chancellor *King*, that the same belonged to the respondent the husband, as administrator to his wife, and not to her brother the appellant, as heir at law.

(*a*) 7 Feb. 1729.

On this appeal the first question that was made was, whether these chattel interests were included in the former devising clause of the will?

And it was objected, that they passed by the devise of all the manors, lands, hereditaments and *real estate*, which the testatrix was any way seised of or *entitled to*, in *Kent*, *Essex*, and *Bedfordshire*; for that a term for years is a chattel *real* and an *estate*, and may pass in a will as a real estate. Besides, a will does not require technical or particular terms, being supposed to be made when the testator is *in extremis et inops consilii*; and therefore, though the words are never so improper, yet if the party's meaning can from thence be picked out, it will be sufficient; and such meaning and intent will take place, however inaccurately expressed.

[28]

That this case was still the stronger, in that the testatrix had given all her manors, lands and hereditaments in *Kent*, *Essex* and *Bucks*, and she had no fee-simple lands in *Essex* and *Bucks*, nor any other lands therein, but these chattel interests; and therefore, as where one who has no lands in fee, but is possessed of a term for years, devises all his lands to *A.* and his heirs, the term for years shall pass: (*b*) So in the present case, the testatrix having no lands in *Essex* and *Bucks*, but only these terms for years, or chattel interests, the same should pass; and the rather, because the fee-simple lands in *Kent* would not satisfy the devise of the lands in *Essex* and *Bucks*; so that it was the same as if the devises had been several, *viz.* as if the testatrix had devised all her lands in *Kent* to her nephew and niece for their lives equally, remainder to their heirs. *Item*, She devised all her lands in *Essex* and *Bucks* to her said nephew and niece for their lives equally; and after their deaths, to their several heirs.

(*b*) See the case of Day *v.* Trigg, *ante*, 1 vol. 286.

On the other side it was said, that these two several clauses in the will comprised the several estates of the testatrix; one the real, and the other the personal estate; that a lease for years could not be called a *real* estate, as it goes to executors, and is liable to debts by simple contract; and the same being personal estate, it would be hard to make

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it pass by the testatrix's devise of her real estate, especially where there is a different clause in the will relating to the disposition of the personal estate, and which by express words has bequeathed all the testatrix's *mortgages* and *credits;* and when the testatrix had no other mortgage but that now in question, and the extended interest upon the statute being a *debt*, (as is also the mortgage,) these must pass by the devise of all *mortgages and credits:* that this is one entire clause, by which the testatrix devised all her manors, lands, tenements, and hereditaments in *Kent*, *Essex*, and *Bucks*, and is satisfied by passing the fee-simple in *Kent;* and if it were an objection that the devise of the lands in *Bucks* and *Essex* would be void, should it not be construed to pass the leasehold lands in those counties; by the same reason the devise of all the mortgages would be void, if *that* did not carry the mortgage of *Cranbroke* in *Essex*.

[29]

And of this opinion was the Lord Chancellor upon the hearing before his Lordship.(1)

One possessed of a term for years devised it to *A.* for life, remainder to the heirs of *A.*, it seems this shall, on *A.*'s death, go to his executor, and not to his heir.

As to the other point, it was objected by the counsel for the appellant, that supposing the chattel interests to be comprised in the first devising clause, it would follow, that where one possessed of a term for years devises the same to *A.* for life, remainder to his heirs, this is an executory devise, and the same as if the devise were to *A.* for life, remainder to *such person as shall be the heir of A.*, and will operate by way of *descriptio personæ*. It was admitted, if I were to devise *lands of inheritance* to *A.* for life, remainder to his heirs, or the heirs of his body; these are words of limitation, and *A.*'s heir, or heir of his body shall take by descent: but in the case of *a term for years* it is impossible the heir should take by descent; nevertheless a term may by *proper words* be limited to *A.* for life, remainder to the heirs of the body, or to the heir general of *A.*, after *A.*'s death; in which case *A.* shall in the mean time take the profits of the premises for his life.

[30]

That as this was agreeable to the reason of the thing, so there was the greatest authority for it, even the authority of *that House;* for which was cited the case of *Peacock* v. *Spooner*,(*a*) where one was possessed of a term for years,

(*a*) 2 Vern. 43, 295.

(1) Vide *Addis* v. *Clement*, ante, Vol. II. p. 456.(*x*)

(*x*) And see *Woodhouse* v. *Meredith*, 1 Mer. 457.

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and on his son's marriage assigned over the term in trust for his son and his then intended wife for their lives, and afterwards in trust for the heirs of the body of the son's wife by the son. The son had issue three daughters, and died; and the wife having administered to her husband, married again, and with her second husband assigned over the term. In this case the determination of the Lord Chancellor *Jefferys* was, that the trust of the whole term vested in the wife, and must go to her executors or administrators: but this decree was *reversed* by the Lords Commissioners, and such decree of reversal *affirmed* in the *House of Lords*. That conformable to this last determination was the decree in the case of *Dafforne* v. *Goodman et al'* (*b*) made by the Lord *Sommers*, who declared, he thought himself bound by the authority of the case of *Peacock* v. *Spooner*, and that it would be of dangerous consequence to vary from a case so solemnly adjudged, and render the rule of property wholly uncertain and precarious, since at that rate none would know how to give an opinion.

(*b*) 2 Vern. 362.

To which it was answered, that where a devise of a term for years is to *A.* for life, remainder after *A.*'s death to the heirs of *A.* both by the reason of the thing, also agreeably to the precedents in point, this remainder ought to go to the executors of *A.* and not to the heir at law. That it would be most plain, if one should devise a term for years to *A.* and his heirs, this must, after *A.*'s death, go to his executor, and not to his heir. So if the devise were to *A.*, and after his death to his heirs; that it must be the same if the devise were to *A. for life*, and after the death of *A.* then to the heirs of *A.* The reason is, for that the law says, where a term for years is given to any one, it shall, after the death of the grantee, go to his executors, and not to his heir; and where the limitation is made to the heir, this is thwarting and contending with the law, and therefore void. And though it should be admitted that where a term is devised to *A.* for life, and after his death to the heir of the body of *A.* (in the singular number) such devise would be good, and take effect by way of *descriptio personæ*, as in *Archer's* case (*a*); yet when the limitation is in the plural number, and not so much as to the heirs of the body but to the heirs of *A.* in *general*, (so remote as that the person who may be heir cannot possibly be within the view of any one) should this be construed a good limitation, it could no way be

[31]

(*a*) 1 Co. 66 b.

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barred by grant, or fine *sur concessit;* for if good, it must be supported by way of *executory devise.*

As to the authority of *Peacock* and *Spooner*, the same was allowed to be good, it having been looked upon as a hardship for a woman with an after-taken husband to bar that provision which was made on the first marriage for the issue thereof; and therefore it was held that such a provision made by the husband, though out of a term for years, was within the equity of the statute(*b*) of 11 *Hen.* 7., and that the wife could not in such case bar the issue, (*i. e.* where the limitation of the trust of the term is to the husband and wife for their lives, remainder to the heirs of the body of the wife by the husband,) and yet even this opinion prevailed with difficulty, and by a pretty strained construction, *a refined reason to help a compassionate case*, insomuch that if that very case were put of voluntary settlement made after marriage, the same would hardly come within that resolution; and a devise is but a voluntary conveyance, though the most favoured of the kind. Or, if the limitation of the trust of the term or the devise had been to the husband for life, remainder to the wife for life, remainder to *the heirs of the body of the husband and wife*, here the construction would have been different, which was the case of *Webb* v. *Webb*,(*c*) determined by the Lord *Harcourt* on a view of precedents and on time taken to consider of it. Where a term was assigned to trustees in trust for the husband for life, remainder to the wife for life, remainder in trust for the heirs of their two bodies, and the husband made an assignment of the term; this was decreed to be good, and to bar the heirs of the body of the husband and wife, and that the whole trust of the term, subject to the wife's estate, vested in the husband. And this being the last precedent, and infinitely stronger than the principal case, it would be dangerous to vary therefrom, especially since here the term is devised to *A.* for life, remainder to his heirs at large, who might be remote, never known, seen, or heard of by the tenant for life, nor by the testator, and consequently who could not be supposed to be within his view or contemplation; and such a devise was never attempted to be made good.

(*b*) See 1 vol. 134 and 370.

[32]

(*c*) 1 vol. 134.

In the last place, the counsel for the respondent strongly insisted on the very great delays that had been made use of by the appellant in this case; and that though the cause had

been four times heard in Chancery, yet this last point had not been started till now. Wherefore it was prayed that the former decree should be affirmed, and the appeal dismissed; which was accordingly done, with 200*l.* costs.(1)

DAVIS *v.* GIBBS. [33]

I was of counsel with the respondent.

(1) Vide *Webb* v. *Webb*, ante, Vol. I. p. 134.

1. Ca. Ab. 313.

JONES *v.* GOODCHILD.

Case 9.

A MOTHER of a bastard child by her will gave all her personal estate to the child, and made *B.* and *C.* her executors, in order to take care of her child and to do it justice. The mother died; and within a short time after the bastard died intestate, without wife or issue. One of the executors brought this bill against the mother of her that was the mother of the bastard, and who had in her hands the portion belonging to the bastard, praying an account of the same.

Lord Chancellor KING.

2 Eq. Ca. Ab. 168. pl. 21. 425. pl. 16.

One having a bastard, leaves a personal estate to her executor in trust for the bastard, who dies intestate, and without wife or issue. The executor brings a bill against one who has part of his personal estate in his hands. The defendant demurs, because the Attorney General and the administrator of the bastard are not parties; demurrer disallowed, for that the executor has the legal title, and consequently may sue for the estate.

The defendant, the mother of the bastard's mother, demurred for want of proper parties; in regard the administrator of the bastard, and likewise the Attorney General in right of the Crown, ought to have been brought before the Court: for that it was plain the Crown was entitled to the[B] personal estate of a bastard dying intestate without wife or issue, consequently without any relation; and since the King might give the personal estate of such bastard to any other person, and the course being for the ordinary to grant ad-

A bastard dies intestate without wife or issue; the King is entitled, and the ordinary of course grants administration to the patentee or grantee of the Crown.

[34]

[B] The reporter has subjoined the following query. A church lease for three lives is granted to a bastard and his heirs, who dies without issue and intestate; what shall become of this lease?—shall it go to the administrator of the bastard, or to the Crown? or does the limitation to the *heirs* make any difference? or is it *casus omissus* out of the act of frauds and perjuries, and so remains liable to occupancy at common law? or, lastly, is the lessor entitled, the lease being determined; for that the premises being granted to the lessee and his heirs during three lives, and the lessee being dead without heir, the lessor may re-enter, in the same manner as where a grant is to a man and the heirs of his body for three lives, (in which case the heirs of the body take as special occupants,) remainder over, and the grantee dies without issue during the three lives; the remainderman shall take. See post, *Low* v. *Burron*, 262.

JONES v. GOODCHILD.

(*a*) Salk. 37, Manning *v.* Napp.

ministration to such(*a*) patentee of the Crown; the defendant would be liable to account over again to such patentee for the personal estate of the bastard, and by that means be put to double expense and vexation.

Lord Chancellor:—The executor of the bastard's mother is legally entitled to the personal estate of his testatrix; and though this may be in trust for the bastard, yet as the executor has the legal title, he can give a good discharge to the defendant, therefore over-rule the demurrer.

Note. In the like case an executor, though a bare trustee, and though there be a residuary legatee, is entitled to sue for the personal estate in equity as well as law, unless the *cestui que trust* will oppose it.

6: Sim. 8.

HODSON (of the Six Clerks' Office) *v.* EARL OF WARRINGTON.

Case 10.

Lord Chancellor KING.

2 Eq. Ca. Ab. 249. pl. 1. The defendant's witness proves a deed, and refers to it in his deposition; the plaintiff cannot compel the defendant to produce the deed at the hearing, the reference thereto not making it part of the deposition.

AT the hearing of this cause it appeared that the defendant had examined a witness to prove a deed executed by him to his brother, to whom he was administrator, and claimed to *be a creditor by judgment, which judgment was said to be discharged by the deed so proved in the cause, the said deed being alleged to amount to a release; in consequence whereof there would be assets to pay the debt due from the intestate to the plaintiffs. And now the question was, whether the plaintiff could compel the defendant to produce this deed?

[*35] It was urged for the plaintiff that he might; for the defendant having proved it, and the witness having referred thereto by his deposition, the same was now become part of the deposition itself, and in the possession of the Court; and as the plaintiff could read any part of the *deposition* taken for the defendant, by the same reason he might insist on having the deed produced; and that the *Master of the Rolls* had made many orders to the like purpose.

To which it was answered, it was true the *Master of the Rolls* had made many such orders, but then it was as true, that whenever these came before the *Lord Chancellor*, they

were as constantly set aside; that a deed was not part of the deposition *unless mentioned therein* in *hæc verba;* and that, as to the deed the defendant had proved, it remained at his election whether he would make use of it or not; that accordingly it was so ruled in the case of *Calmady* v. *Calmady*, where the Court would not oblige the defendant to produce a deed which he had proved.

[36]

The *Lord Chancellor* held this to be the course of the Court, and therefore would make no order for the defendant's producing the deed.(1)

The plaintiff gets judgment in the petty bag, after which he is stopped by an injunction. The year and day pass; the plaintiff though hindered by the injunction, yet cannot sue out execution without a sci. fa.

In the same case it also appeared that the plaintiff had recovered judgment in the *petty bag;* after which the defendant brought a bill, and had stopped the plaintiff two or three years by an injunction: so that the plaintiff in the judgment could not regularly sue out execution without a *scire facias.* Wherefore it was moved, that the plaintiff at law might, under these circumstances, sue out execution without a *scire facias*, and not suffer by the act of the Court.

Sed per Cur':—I cannot alter the course of the Court, but must take care to preserve it; and it being above a year and a day after the judgment, let the plaintiff sue out his *scire facias.*[C] (*x*)

[C] *Q.* Whether in this case the plaintiff *Hodson* could not have taken out execution, and continued it by *Vicecomes non misit breve*, agreeably to what was said by the Court of *B. R.* in the case of *Booth* and *Booth*, Salk. 322.

(1) Vide *Davers* v. *Davers*, ante, 2 vol. 410.

(*x*) This has since been altered; see *Michell* v. *Cue*, 2 Burr. 660.; and 2 Williams's Saunders, 72 c. (5th ed.) note to *Underhill* v. *Devereux*.

DE

TERM. S. TRINITATIS, 1729.

Case 11.

NEWSOME *v.* BOWYER.

Lord Chancellor KING.

2 Eq. Ca. Ab. 270. pl. 28. Where the husband was attainted of felony, and pardoned on condition of transportation; and afterwards the wife became entitled to some personal estate, as orphan to a freeman of London; this personal estate decreed to belong to the wife as to a feme sole.

A HUSBAND (one *Dawson*) was attainted of felony for rasing and altering a bank bill, and afterwards pardoned, upon condition he should within —— months transport himself out of his Majesty's dominions of *Great Britain* and *Ireland*, and continue in exile during his life. After the pardon, upon the death of the wife's father, (who was a freeman of *London*) a share of the orphanage part came to the wife of the person attainted; and it was admitted, that the orphanage part coming to the wife after the pardon of the husband, and after such time as he had transported himself, was not forfeited. But then it was objected, that the same coming to the wife after the pardon of the husband, did belong to the husband, who by the pardon was become capable of taking.

[38]

On the other side it was insisted, that this was just as if the husband had been banished by act of parliament, or had abjured the realm; like the case of *Judge Belknap*, or that of *Thomas de Wayland*, 1 Inst. 133., where it is said that the wife of one banished for life may sue as a feme sole: the same of the wife of one who has abjured the realm, it being a civil death; and that this was to be compared to abjuration, which is a voluntary act of the party, and in which case the law formerly was, that one who had committed felony and fled to a church or sanctuary, provided he should voluntarily abjure the realm, was not punishable with death. And the case in 2 Vern. 104., *Countess of Portland* v. *Prodgers* was cited, where it is determined that the wife of a husband banished for life may make a will, and act in all things as a feme sole.(*a*) [A]

(*a*) See also Salk. 116. Dearly *v.* Duch. of Mazarine.

[A] A feme covert, having a separate estate, may in a court of equity be sued

The Lord Chancellor seemed to hesitate somewhat in his opinion, but expressed an inclination to assist the wife; nevertheless he thought this was no banishment, which cannot be but by act of (*b*) parliament; neither could it, as he apprehended, be resembled to abjuration.[B] However his Lordship ordered it to come on again, and the matter to be stated in a petition by way of case.[C]

(*b*) 1 Inst. 133.

[39]

as a feme sole, and proceeded against without her husband(*x*); for in respect of her separate estate, she is looked upon as a feme sole, 2 *Vern.* 614.(*y*) And in a court of equity (though not in law) baron and feme are considered as two different persons; and therefore a wife by her prochein amy may sue her own husband, *Precedents in Chancery*, 24. 2 *Vern.* 493., and in the case of *Bell* v. *Commissary Hyde's Wife*, upon affidavit that she had a separate estate, a subpœna served upon her to appear and answer for such time as her husband was gone to *Holland*, and in the Queen's service, was by the Lord Keeper *Harcourt*, after advising with Sir *John Trevor*, Master of the Rolls, ruled good; and the wife in that case prayed, and had time to answer. Last Seal after *Hil.* Term, 1711.

[B] As so little occurs in the modern books concerning abjuration, it is presumed the following account of it will not be unacceptable to the reader:—

By the ancient common law of *England*, if a man committed any felony, excepting sacrilege, and fled to a parish church, he might within forty days before the coroner confess the felony, and take an oath to abjure the kingdom for ever; and if he thus confessed and took the oath, he was thereby attainted of the felony, and then he had forty days from the coming of the coroner to provide and prepare for his voyage; and the coroner assigned to him such a port as he chose for his departure out of the kingdom; and if he did not go straightway out of the kingdom, or being gone out, did return without licence, he had judgment to be hanged, except he was a clerk, and then he had his clergy. This practice was what the law called abjuration; and being by several regulations (in the time of *Hen.* 8.) in effect taken away, the revival thereof was by the 35 *Eliz. cap.* 1. *sect.* 2. thought to be a wholesome severity, fit to be inflicted on the Protestant Dissenters of those times; but the Toleration act, (1 *W. & M. stat.* 1 *cap.* 18. *sect.* 4.) does expressly, and by name, exempt the Protestant Dissenters from the penalties of the 35 *Eliz.* See Sir *Peter King's* speech in maintenance of the second article of impeachment at Dr. *Sacheverell's* trial, *State Trials*, Vol. V. p. 693.

[C] It appears from the Register's book, that on the 18th of *March* 1729-30, the sum of £599. 17*s.* 7*d.* was ordered to be laid out on government securities with the approbation of the Master; and that the interest and produce thereof, and likewise the arrears of the dividends on 500*l. S. S.* annuities, and the future dividends should be paid to the wife for her maintenance, until further order of the Court; and that afterwards the wife, on the husband's dying, married again; and on the petition of the second husband and wife, heard 20th *Oct.* 1731, it was ordered, that the trustees in the freeman's will should transfer the 500*l. S. S.* annuities, and also pay the £599. 17*s.* 7*d.* and the dividends, to the second husband.

(*x*) And where relief is sought against the separate estate of the wife, service of process on the husband alone is not sufficient, but the wife must be also served, *Jones* v. *Harris*, 9 Ves. 488.

(*y*) See *Powell* v. *Hankey*, ante, 2 vol. 85.

2. Russ. Thu. 242.
9. Sim. 406.
23. Ch. D. 219.
37. —— · 523.
(93) 3. Ch. 356.

DE

TERM. S. TRINITATIS, 1730.

SIR JERMIN DAVERS ET AL'. *v.* SIR JERMIN DEWES ET AL'.

Case 12.

In a cause brought on by consent for the opinion of the Lord Chancellor.

Lord Chancellor KING.

2 Eq. Ca. Ab. 292. pl. 14. 443. pl. 53. *A.* by will declares his intention to dispose of his household goods by his codicil; and devises the residue of his personal estate not disposed of nor reserved to be disposed of by his codicil, to his wife. Afterwards the testator makes a codicil, and does not dispose of his household goods thereby; the household goods shall not go to the residuary legatee, but according to the statute of distribution.

[*41]

HENRY, late Lord *Dover*, being seised in fee of the manor and manor-house of *Cheevely* in *Cambridgeshire*, and having very rich goods and furniture there, together with great quantities of plate; and being possessed of divers leasehold houses in St. *Martin's* and St. *James's Westminster*, by his will dated the 20th of *January* 1707, appointed *Thomas Folkes*, Esq. and others, (since deceased) executors, leaving the said *Folkes* a legacy of 200*l.* for his trouble. He gave to his wife the Lady *Dover*, all his plate whatsoever for her life, 5000 ounces whereof were to be at her disposal for ever: but declared, that *he intended to dispose of the residue of his plate by* a *codicil*. He gave *Cheevely* house to his wife for life, declaring, *that he would dispose of the goods and furniture in* Cheevely *house after his wife's death by a codicil to his will;* and then by his will he bequeathed the *residue of his personal * estate whatsoever not before disposed of, or reserved to be disposed of by his codicil*, to his wife the Lady *Dover*. Afterwards the Lord *Dover* made two codicils *without* disposing of his goods and furniture in *Cheevely* house, or of the surplus beyond the 5000 ounces of plate; and died in *April* 1708, leaving several nephews and nieces by his brothers and sisters, (who all died in his lifetime,) but some of them left more children than others.

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The Lady *Dover*, who was a Papist, made her will, having appointed *Richard Gipps*, Esq. and one *Robins*, executors, and Mr. *Gipps*, residuary legatee, and died the 12th of *October*, 1726. Upon this case the following questions were made, and laid before the Lord Chancellor for his opinion.

First, It was argued, that those goods and furniture in *Cheevely* house, and the surplus of the plate, did, by the Lord *Dover's* will, belong to his lady, and passed to her as the devisee of the residuum of the personal estate; for that, though the testator did declare by his will, that he would dispose of his goods and furniture in *Cheevely* house by his codicil, and likewise that he intended thereby to dispose of the residue of his plate beyond the 5000 ounces; still this was no more than an intention; and he having made two codicils afterwards without disposing of either of these things, it shewed he had altered such his intention, and chose to let them fall into the residuum devised to his lady. That as to the bequest of the surplus of the personal estate, though it was but of the residue of the personal estate not before otherwise disposed of, or reserved to be disposed of, yet that did not prevent the Lady *Dover's* taking them as residuary legatee. And, *first*, these words *not otherwise disposed of* would not bar her; since the goods and furniture of the [42] house were not otherwise disposed of by the will; nothing more appeared by the will, than that the testator the Lord *Dover intended* otherwise to dispose of the same, which he had not done. And the Solicitor General compared it to the case where the testator does actually by will make a bequest of a lease for years, or other valuable thing to any person, and makes another residuary legatee; this is not only declaring an intention, that the residuary legatee shall *not* have this lease, but that the testator *actually gives* it to another. And in the case put, suppose the like words were in the will, as are in the present case, *(viz.)* that the testator gives the surplus of his personal estate not otherwise disposed of by his will, and then the legatee of the lease dies in the testator's life-time; there would be no question but that this lease, though not intended by the will to go to the residuary legatee, but actually given *from* him, shall yet fall into the residue; and by the like reason so should it do in the principal case. Then, as to the words following, "*nor reserved* "*to be disposed of by my codicil;*" this could be no stronger than in the former case put, *(viz.)* that he had disposed of a

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legacy by his codicil to one who afterwards died in his (the testator's) life-time; which yet would not hinder it from falling into the bequest of the residuum: that it would be hard to maintain, that the testator, the Lord *Dover*, who had made a will, and taken so much care in his dispositions, ought to be construed to die intestate, as to any part of his personal estate.

But the Lord Chancellor was of opinion, that these goods and furniture in *Cheevely* house, and the surplus of the plate beyond the 5000 ounces, were undisposed of by the will, and should go to the next of kin according to the statute of distribution; that it was plain the testator did not intend they
[43] should pass by the will, but reserved them to be disposed of by a subsequent codicil; and if it were admitted, that the Lord *Dover* did *not* intend to dispose of them by the will, his Lady as residuary legatee could not thereby be entitled to them: because the devise of the surplus, as penned, was very strong against her, giving her the residue of the personal estate not thereby otherwise disposed of or reserved to be disposed of by the codicil. Now the goods in question *were* reserved to be disposed of by the codicil, and therefore could not pass by the devise of the residuum by the will.(1)

Secondly, It was contended on behalf of Mr. *Folkes* the only surviving executor that *he* was entitled to these things as executor; for that, though there was an express legacy to him, there was the like also to the next of kin; and then the executor, *as such*, has a general right at law to all the testator's personal estate not given from him by the will.

Where an executor has an express legacy for his care and pains, though the next of kin has also an express legacy; yet the surplus shall go according to the statute of distribution; especially if the surplus was intended to be disposed of.

Sed per Cur. Mr. *Folkes* the executor having an express legacy of 200*l.* given him for his trouble, and the rest of the personal estate being disposed of, or at least intended to be disposed of by the codicil, Mr. *Folkes* is plainly to be considered but as an executor in trust. (2)

(1) In *Attorney-General* v. *Johnstone*, Amb. 577. the particular words of the will prevented the lapsed legacies from falling into the residue. (*x*)

(2) So, *Andrew* v. *Clark*, 2 Vez. 162. contra *Attorney-General* v. *Hooker*, ante, 2 vol. 338. Et vide *Farrington* v. *Knightley*, ante, 1 vol. 544.

(*x*) *Bland* v. *Lamb*, 2 Jac. & W. 399.

Then it was insisted, that the wife of the Lord *Dover*, though a Papist, was capable of taking a leasehold estate by devise; for which purpose the statute of the 11 and 12 W. 3. c. 4. s. 4. was mentioned, whereby it is provided, "that "from and after the 29th of *September*, 1700, if any person [44] "educated in the Popish religion, or professing the same, "shall not, within six months after he or they shall attain "the age of eighteen, take the oaths of allegiance and su- "premacy, and conform, &c." as by the act is required, "every such person shall, in respect of him or herself only, "and not to or in respect of any of his or her heirs or pos- "terity, be disabled, or made incapable to inherit or take by "descent, devise, or limitation, in possession, reversion or "remainder, any lands, tenements, or hereditaments, &c. "And that during the life of such person, and until he or "she shall take the oaths, and conform, &c. the next of his "or her kindred, which shall be a Protestant, shall have and "enjoy the said lands, tenements, and hereditaments, without "being accountable for the profits by him or her received "during such enjoyment, but in case of any wilful waste "committed on the said lands, &c. by such persons so en- "joying, the party disabled, his her or their executors or "administrators, shall recover treble damages for the same "against the person committing the same, his or her exe- "cutors or administrators, by action of debt."

Now as to this; the Lady *Dover* being above the age of eighteen years and six months at the time of passing the act, and at the death of her husband, the testator, the Lord *Dover*, she was said to be perfectly out of the said clause, because it was impossible for her to take the oaths, and conform pursuant thereto, she being above the age of eighteen and *eight* months before the act was made; and it was represented, as not likely to be of any mischievous consequence to construe the Lady *Dover* out of the act, as being eighteen years and eight months old when the same passed; forasmuch as there are very few now living, and shortly will be none living, who were of that age at the time of the passing the act, *(viz.)* in 1700. And with regard to the following words, which are part of the same paragraph, "that from and after the 10th [45] "day of *April*, 1700, every Papist, or person making profes- "sion of the Popish religion, shall be disabled, and is hereby "made incapable to *purchase*, either in his or her name, or in

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" the name of any other person or persons, to his or her use, " or in trust for him or her, any manors, lands, profits out of " land, tenements, rents, terms or hereditaments in *England* " or *Wales*, &c. And all and singular estates, terms, and " any other interests or profits whatsoever out of the land, " from and after the said 10th of *April*, to be made suffered " or done to or for the use or behoof of any such person or " persons, or upon any trust or confidence mediately or im- " mediately, to or for the benefit or relief of any such person " or persons shall be utterly void, and of none effect to all " intents, constructions, and purposes whatsoever." With respect to this clause it was argued, that though the words may seem general, and to take in all Papists of what age soever, yet they disable such as take by *purchase* only; and the word *devise* being left out of this part of the clause, and inserted in the former part, shews it to have been the intent of the act, that this latter should not extend to a *devise*, but to a *purchase* only, where the party Papist contracts for an estate, which by this clause he is disabled to do: and taking the latter clause to extend to a devise as well as the former, the act is inconsistent; for that by the latter part of the paragraph no person whatsoever that is a Papist, though of *any* age, can take; whereas by the former part an infant under the age of eighteen and a half may take, if such infant shall duly conform.

[46]

A Papist cannot take a freehold or leasehold estate by will, because taking by will is taking by purchase; and by the express words of the statute 11 & 12 W. 3. c. 4. a Papist is disabled to take by purchase. Also terms for years are expressly mentioned in the statute.

To which the Lord Chancellor replied, that if this were *res integra*, it would be indeed very questionable, but that the point had been settled in the case of *Roper* and *Radcliffe*,(1) in the House of Lords, after so solemn a debate, as ought to render it conclusive to all the courts at *Westminster*; that accordingly several subsequent resolutions (*a*) had been made pursuant thereto, and therefore to recede from this would create great confusion and uncertainty, the consequence of which was, that the word *purchase* must, according to the above resolution, be understood of taking an estate by purchase; and he who takes by devise does in construction of law take by purchase. And the words *terms for years* being particularly mentioned in this clause, and the latter words thereof being express, that all such estates

(*a*) Vide *Hill* v. *Filkin*, ante, 2 vol. 6.

(1) 1 Bro. P. C. 450. 9 Mod. 167, 181. 10 Mod. 230.

terms and [A] interests so made, shall be void; his Lordship was of opinion, that the Lady *Dover*, being a Papist, was not capable of taking these leasehold estates by virtue of her husband the Lord *Dover's* will; observing withal, that the case of *Roper* and *Radcliffe* was very strong, even much stronger than the present; in regard *that* was not of a devise of land, or of a trust of land, to a Papist; but a devise only that the land should be *sold* for payment of debts and legacies, and the *surplus* paid to a Papist; which was notwithstanding *resolved* to be a profit out of land; and as the devisee of the surplus might in equity, on paying the debts, &c. elect to take the land, and prevent the sale, therefore it [47] was held to be within the act.

Whereupon it was urged, that supposing the devise of these leasehold estates to the Lady *Dover* was void, she being a Papist; then the consequence would be, that they must go according to the statute of distribution, which gives the wife half, where there are no children, as in the present case.

But here it was insisted by the other side, that as the wife, being a Papist, could not take by a *will*, so neither could she be entitled by the statute of distribution, which is a will made by the *Legislature* for such as have made none for themselves; and it would be putting it in the power of the Papist to elude the act by saying, "I know I cannot give my "leasehold estate to my wife or child that are Papists; but I "will die intestate, at least as to such leasehold estate:" and then the act of Parliament will give it to them, though they be Papists. Besides, there are remarkable words in the act made to prevent the growth of Popery, in the clause aforesaid, which says, "that all estates, terms, or interests "made done or *suffered*, to or to the use of a Papist, shall "be void." Now dying intestate is *suffering* the estate, for want of a will, to go to a Papist. Also the intent of the act was, that the Papists should not be capable of taking *any interest* in leasehold or freehold estates, whereby they might be enabled to prejudice the government; and whether such Papist has the estate either through the gift of the ancestor by his making a will, or by his dying intestate, it will be

[A] For this reason it has been determined, that where a judgment was given to a Papist, he could not extend the land; for that would give him an interest in the land; and it is the same thing, where the judgment is given in trust for a Papist. By Lord *Parker*, *Lowther* v. *Fletcher*, *Hil.* 1719.

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equally within the mischief intended to be prevented by the act; and though this might seem an hardship, it was no more still than what the act designed, *(viz.)* to put hardships upon Papists, in order to their conformity.

[48]

On the contrary it was argued, that though the act did intend to put hardships on Papists, yet it was only such hardships as the words and plain meaning thereof necessarily imported; that whether a Papist was disabled to take by the statute of distribution, was a question never yet determined; that the term [B] *suffered*, on which so much stress had been laid, was plainly thrown into the act as a word of course, and applicable to such conveyances as should thereafter be made to the use of, or in trust for, a Papist, *by way of common recovery;* but that supposing the word *suffered* was to be taken in the largest extent, then a *descent* would be within the clause, and so no lands could *descend* to a Papist of above the age of eighteen years and six months; for when lands come by descent to an heir, it is what the ancestor *suffers* to happen for want of a will: that by such construction all the freehold and leasehold estates that should ever come to Papists would be effectually disposed of; the former, to the lord by way of escheat, and the latter to the Crown, for want of an owner. Lastly, that this was a penal law, and not to be extended by any liberal construction.

A Papist, if above eighteen and a half, is capable of taking lands by descent; also a Papist may take a personal estate by the statute of distribution.

Lord Chancellor: I do not know that this point was ever in judgment: but I am of opinion that a Papist *may* take within the statute of distribution. I must recur to the disabling clause in the latter end of the statute of the 11 and 12 W. 3. made to prevent the growth of Popery, which says, "that no Papist shall *purchase* any manors, lands, or terms, "&c." Now a purchase must be by the act of the party in the way of grant or conveyance, or at least by a will; but in the case of one dying intestate, it is the *act of the law;* [C] it is the *Legislature* that gives these distributory shares to the widow and next of kin; it is a succession *ab intestato* to a personal estate, similar to a descent of land, where an heir, though a Papist, (as here) if above the age of eighteen and six months, may inherit. Besides, the intent of the statute of distribution was, that the administrator should sell all the

[49]

[B] This expression, and indeed the whole paragraph, is almost word for word from 1 Jac. 1. c. 4. s. 6.

[C] By the same reason it should seem, that a Papist is capable of taking as tenant by the *curtesy*, or in *dower*.

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personal estate of the intestate, turn it into money, and distribute it; now it would be inconsistent, that the Papist should have a share of the money *left* by the intestate, but not of the money raised by the administrator out of the intestate's estates.

In the next place it was admitted on all sides, and decreed, that as to all personal things, and in particular the goods and furniture at *Cheevely*, and the surplus of the plate above the 5000 ounces, the Lady *Dover* the widow was entitled to a moiety thereof by the statute of distribution.

The last question was, whether the personal estate which the Lord *Dover* had left undisposed of by his will, should be distributed *per stirpes*, or *per capita?* The Lord *Dover* having left only nephews and nieces, (*viz.*) one nephew by his brother, and three nephews and two nieces by a sister.—Whereupon it was objected, that were this the case of grand-nephews, and grand-nieces that were next of kin, they should take [D] *per capita;* because the statute says, [50] "there shall be no representation among collaterals after "brother and sisters' children:"(*x*) but among nephews and nieces, (as here) there may be representation by the express words of the statute.

But here Lord Chancellor interrupted the counsel, and said, that all these nephews and nieces of the intestate were equally of kin to him, and took as such, and not by repre-

If one dies intestate without issue, brother or sister, but leaving several brother's and sister's children, (*viz.*) one nephew by a brother, and three nephews and two nieces by a sister; these shall take *per capita*, and not *per stirpes*, because all equally of kin.

[D] It may in this case be not improper to take notice, that where a person thus entitled to a distributory share, dies within a year after the intestate; in such case, though by the statute no distribution is to be made within a year, yet the share of the deceased person will be an interest vested, transmissible to his executors or administrators: for *in this sense* the statute makes a will for the intestate; and it is as if a legacy was bequeathed payable a year hence, which would plainly be an interest vested presently. Nay, where one died without wife or issue and intestate, leaving a father, who also died before taking out administration, or altering the property of the estate; though in that case there was only *one* who could claim as next of kin, and so, literally and strictly speaking, there could be no *distribution;* yet by the statute, the right to the intestate's personal estate vested in the father, and consequently belonged to *his* executors or administrators, and not to the next of kin to the first intestate, who in such case happened to be a different person, *Grice* v. *Grice* by the Lord *Cowper*, *Hil.* 1708. And note; Mr. *Vernon* upon this occasion told the reporter, it had been twenty times determined in equity, that where there is only *one* person entitled to take the personal estate of the intestate, as next of kin, the statute vests the right in that person, making him as a legatee of the party deceased.

(*x*) Vide Pett's Case, ante, 1 vol. 25.

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sentation; consequently, they must take *per capita*, and not *per stirpes*. *Secus*, had any one brother or sister been living at the Lord *Dover's* death: that this point had been determined by the Lord *Sommers* upon great deliberation in the case of (*a*) *Walsh* and *Walsh*; and subsequent cases having been resolved agreeably thereto, it was fit that matter should now be at rest. (1)

(*a*) Pre. Cha. 54.

(1) Vide *Lloyd* v. *Tench*, 2 Vez. 213. *Bowers* v. *Littlewood*, ante, 1 vol. 595. *Durant* v. *Prestwood*, 1 Atk. 454. *Stanley* v. *Stanley*, 1 Atk. 455.

40. Ch. D. 206.

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Case 13.

STORKE *v.* STORKE, et e contra.

Lord Chancellor KING.

A presbyterian who had three infant daughters bred up that way, and had three brothers presbyterians, makes his will, appointing his brothers, and also a clergyman of the church of England, guardians to his three infant daughters, and dies, having senthiseldest daughter to his next brother; the clergyman gets the two other daughters into his custody, and places them at a boarding-school where they were bred according to the church of England; and brought his bill to have the eldest daughter placed out with the other daughters; the three brothers that were presbyterians brought their bill to have the two daughters delivered to them, offering parol evidence that the testator directed and declared he would have his children bred up presbyterians; the court declared no proof out of the will ought to be admitted in the case of a devise of a guardianship, any more than in the case of a devise of land.

JAMES STORKE, a considerable merchant at *Rumsey* in *Hampshire*, had three daughters, *Mary*, *Elizabeth*, and *Ann Storke*; *James Storke* was a strict presbyterian, and bred up all his children and family that way; he had three brothers, *Samuel*, *Thomas*, and *Abraham*, who were also presbyterians. The said *James Storke* having survived his wife, made his will, and appointed his three brothers, and one *Andrews* (who was a clergyman of the church of *England*, and his wife's brother) executors thereof, and guardians to his three infant children. The testator in his life-time sent his eldest daughter, who was sixteen years of age, to his brother *Samuel Storke*, a merchant in *London*, to be educated, and soon after died. Upon his decease, *Andrews*, one of the guardians, living near the testator in *Hampshire*, got into his custody the two daughters that were at their father's house at his death, and placed them at a boarding-school in *Hampshire*, where they were bred up in the way of the church of *England*. After which he procured a bill to be brought in the names of the three infant daughters, against the four executors and guardians, for an account of the testator's personal estate, the greatest part whereof was in the hands of the three *Storkes*, the testator's own brothers, and praying, that the court would give directions

for the education of the three infant daughters in the way and principles of the church of *England*. On the other hand, the three brothers brought their bill to have the two daughters delivered to *them*.

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The *Lord Chancellor* decreed an account of the personal estate; and in regard the three brothers of the testator, the *Storkes*, had no way misbehaved themselves, but had acted in every thing for the good and benefit of the infant's estate; all parties were ordered to have their costs out of the said estate. But though there were proofs in the cause, of directions having been given by the testator, that his children should be brought up in his own form of religion, and as presbyterians; yet the same not being expressed in his will, his Lordship declared, he would not go out of the will, nor hear any parol proof touching the testator's intentions how his infant daughters should be educated as to their religion; saying, that *parol proof ought no more to be admitted in the case* (1) *of the devise of a guardianship, than in the case of a devise of land*. However, with respect to the eldest daughter, she being above the age of sixteen years, and in *London*, at the house of the testator's brother *Samuel Storke*, one of the guardians; it was ordered that she should be sent for immediately into court, which being accordingly done, and she being there asked where she desired to be; on her expressing a desire to continue with her uncle *Samuel Storke*, his lordship declared she should continue there if she pleased.

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As to the other two daughters; though it was pressed that the three guardians and those, the testator's own brothers, did desire to have these children delivered to them, and that the court had a power so to do, since by the guardians disagreeing, the care and guardianship of the infants devolved to the court; [E] and though this was represented to have been the intention and earnest desire of the testator, who could not believe that the single guardian, the clergyman, would have opposed the other three; and notwithstanding it was insisted, that in the case of so great a majority, the court would order the two daughters to be delivered over to

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[E] See the case of *The Duke of Beaufort* v. *Berty*, vol. 1. p. 703. and that of *Darcy* v. *Lord Holderness*, cited there in the note.

(1) Sed vide *Anon.* 2 Vez. 56.

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(*a*) 1 W. & M. sess. 1. c. 18.

the three guardians, to be educated as they should think proper, especially in regard, since the act of (*a*) toleration, it is not unlawful to breed them presbyterians: and the intention of the testator in all lawful things ought to take place: yet the Lord Chancellor would do no more than direct the Master to inquire, whether the school in *Hampshire*, at which the two younger children were placed by the guardian, the clergyman, was a good and proper school for their education; giving liberty to all parties to apply to the court as there should be occasion. (1)

(1) Reg. Lib. A. 1729, fol. 474.

Case 14.

CAPTAIN STRUDWICKE'S Case.

Sir JOSEPH JEKYLL, Master of the Rolls.

Mos. 365. One that had been a prisoner in Newgate for debt, but since removed to the Fleet, is excommunicated; the court of chancery will not direct the cursitor to make out a writ of excomm' cap' to the warden of the Fleet; but the writ may be directed to the sheriff, who may return a non est inventus; and on this return, B. R. may grant an habeas corpus, and thereon charge him with an excomm' cap'.

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THE defendant, Captain *Strudwicke*, having been committed to *Newgate*, as the county gaol, for debt, and having been sued in the spiritual court at the promotion of his wife *causâ adulterii et sævitiæ*, in which court there was a sentence of divorce, *à mensa et thoro*, and a condemnation in costs, for non-payment whereof, he being excommunicated, and having since procured himself to be removed by *habeas corpus* into the *Fleet* prison: the prosecutor in the spiritual court applied to the cursitor to make out a writ of *excommunicato capiendo*, directed to the *Warden of * the Fleet*, to charge the defendant *Strudwicke* therewith. But the cursitor, apprehending that it was the constant course to make out this writ of *excommunicato capiendo* to the *sheriff, and to no other person*, refused to make out the same directed to the warden of the *Fleet*; wherefore, as the directing the writ to the sheriff would be to no purpose, forasmuch as *he* could not go into the *Fleet* prison to execute it, so that here would be a failure of justice, unless the writ might be directed to the warden of the *Fleet*: for this reason, application was now made to the court of Chancery, for an order to the cursitor to make out the writ as desired; insisting, that this ought the rather to be done, because the defendant, while he remained a prisoner in *Newgate*, the county gaol, might have been there charged by the *sheriff*; whereas having by

his own artifice removed himself to the *Fleet*, he had now endeavoured to elude the justice of the court. That the statute of the 5th of *Eliz. cap.* 23. (whereby the writ of *excommunicato capiendo* that was before returnable in chancery is made returnable in the King's Bench) mentions, throughout the several parts of it, the *sheriff or other officer to whom such writ shall be directed, or to whom the execution thereof shall appertain;* which words *imply*, that the writ *may* be directed to *other officers* as well as the sheriff: and it is plain, that in some cases it cannot be directed to the sheriff, as where the sheriff is the person excommunicated; on which occasion it must be directed to the coroner: and by the same reason, in the present case the writ might (it was said) be directed to the warden of the *Fleet*, both to prevent a failure of justice, and that the party should not take advantage of his own artifice in removing himself from *Newgate* to the *Fleet*.

STRUDWICKE'S Case.

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The Master of the Rolls, before whom this matter was moved, asked whether there was any precedent of a writ of *excommunicato capiendo* being directed to the warden of the *Fleet?* To which it was answered, that none could be found; but that the court of Chancery had often directed their *attachments* to the warden of the *Fleet* to take the prisoners in the *Fleet* prison. (*x*)

The court of Chancery sends attachments to the warden of the Fleet.

Upon which his Honour, having taken time to consider of it, on the day of motions next after the term *declared* his opinion, that the court of Chancery could not order the cursitor to direct this writ to the warden of the *Fleet*, the same being a *viscountiel writ;* and though the words of the statute of *Elizabeth* in several parts thereof mention the sheriff *or other officer*, this might be meant of *bailiffs of liberties, or the coroner*, who in all cases is the proper officer to execute process where the sheriff is a party, or otherwise incapacitated: that in the county palatine of *Durham*, the writs are directed to the chancellor of *Durham*, ordering him to command the sheriff; that in this case there need be no failure of justice, because the writ might be directed to the sheriff, on whose returning a *non est inventus* into the King's Bench, that court might grant an *habeas corpus* to bring up the prisoner, and there charge him with an *excommunicato capiendo;* but that the court of Chancery's granting attach-

Writ of excomm' cap' is a viscountiel writ: but where the sheriff is a party, or otherwise incapacitated, it must be directed to the coroner.

In the county palatine of Durham, writs are directed to the chancellor of Durham, ordering him to command the sheriff.

(*x*) *Anon.* Moseley, 301.

STRUDWICKE'S Case.

All writs of excomm' cap' must be returnable in B. R.

ments to the warden of the *Fleet* was not a parallel case, because those attachments are not returnable in the King's Bench, but in Chancery; whereas all writs of *excommunicato capiendo* must be returnable in the King's Bench. Wherefore, there being no precedent of such writ being ever directed to the warden of the *Fleet*, nor any likelihood of a failure of justice for want of it, *his Honour* refused to order the cursitor to make out this writ directed to the warden of the *Fleet*.

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Case 15.

Lord Chancellor KING.
Lord C. J. RAYMOND.
Lord C. B. REYNOLDS.
Mr. Justice PRICE.

2 Eq. Ca. Ab. 330. pl. 9. Fitzgib. 150. A. has two sons, B. and C. and on the marriage of B. A. settles part of his lands on B. in tail, and A. being seised in fee of the reversion of these lands, and of other lands in possession, devises "all his "lands and "hereditaments not "otherwise "by him settled or disposed of;" the reversion in fee will pass.

SIR JOHN CHESTER had two sons, *William*, afterwards Sir *William Chester*, and *John*, now Sir *John Chester;* Sir *John Chester* the father, on the marriage of his eldest son *William*, settled lands of 800*l. per annum*, part in possession, and part in reversion after his own death, on the said *William* for life, remainder as to part thereof to the wife of *William* for life, remainder to the first, *&c.* son of the marriage in tail male, remainder to trustees for 600 years to raise portions for the daughters of the marriage, (*viz.*) 4000*l.* amongst all the daughters, remainder to the said *William* and the heirs male of his body by any wife, *remainder to Sir* John Chester *the father in fee.* Afterwards Sir *John Chester* the father settled other lands of near 1000*l. per annum*, on his younger son, now Sir *John Chester*, for life, remainder to his first, *&c.* son in tail male successively; and being seised in fee of lands in possession of about 400*l. per annum*, in *Littleton*, *Marston*, and *Milbrooke*, by his will devised all his lands, tenements and hereditaments in these three towns of *Littleton*, *Marston* and *Milbrooke*, *or elsewhere*, *not by him formerly settled, or thereby by him otherwise disposed of*, to trustees for the term of 100 years, upon the trusts therein mentioned, *remainder to his said younger son* John Chester *in fee.* The trust of the term of 100 years was, to raise money out of the yearly rents and profits of the premises comprized in the said term, to pay the testator's debts and legacies, in aid of his personal estate. The testator died, leaving an eldest son *William*, afterwards Sir *William Chester*, and a younger son *John*, now Sir *John*

Chester. About a year after the death of the testator, Sir *William Chester* died leaving six daughters, (the now plaintiffs) and leaving no issue male.

The question before the court was, whether this remote reversion expectant upon the several estates created by the said settlement on the testator's son *William*, should be construed to have passed by this will? If it did, then it would belong to the defendant Sir *John Chester;* if not, the same would descend to the six daughters of Sir *William Chester*, as heirs at law of Sir *John* the father, and Sir *William* his eldest son. And now this case was argued before the Lord Chancellor, the Lord Chief Justice *Raymond*, the Lord Chief Baron *Reynolds*, and Mr. Justice *Price*, whom the Lord Chancellor called to his assistance.

And by those who argued for the plaintiffs, the heirs at law, it was insisted, that according to the words of the will, according to the intention, and the several circumstances manifesting such intention, it could not be reasonably thought, that the testator meant to pass this remote reversion in fee by his will; that as the plaintiffs were heirs at law, they were to be favoured, and not to be disinherited by doubtful words, especially as they were not endeavouring by this suit to strip the honour; since the better half of the estate had been settled, by Sir *John Chester* the father, upon the defendant his younger son, in his lifetime, in possession and reversion: but that the daughters of Sir *William* would not be provided for according to their quality, if they had only 4000*l.* among six of them, and the additional lands, which they were entitled to from their father Sir *William*, were but of small value: that the question was not, whether Sir *John Chester* had it in his power to devise this reversion in fee; for it was plain he had: but whether in this case, it was his intention to pass it; and here it was said to appear plainly not to have been his intention; for that if he had [58] really intended to devise this reversion in fee, he would have mentioned it, as he had done other lands of less value. He had devised all his lands in the three towns of *Littleton*, *Marston*, and *Milbrooke;* and why not in the other towns, where the lands were of greater value? That it was true, in this devising clause the testator had added the word *elsewhere*, (the devise being of all his lands, tenements, and hereditaments in these three towns, and *elsewhere;*) but that this loose general expression, when the testator had be-

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fore descended to particulars, should never take in lands of greater value than the particulars before expressly mentioned; for which was cited the case of *Wynn* and *Littleton*, 1 *Vern.* 3. and 2 *Vent.* 351. where the same case is reported by the name of Sir *Thomas Littleton's* case, and is as follows: A man devised to *J. S.* and his heirs all his lands in *Denbighshire, Montgomeryshire* and *Flintshire, or elsewhere within the dominion of* Wales; and the testator was seised in fee, and in possession, of lands in other counties within the dominion of *Wales,* that were in mortgage to him, and these mortgaged lands were of greater value than the other lands; whereupon it was declared to be the then Lord Chancellor's opinion, and decreed, that after the testator in that case had descended to particulars, the word *elsewhere,* which is like an *et cætera,* and comes in *currente calamo,* should not comprehend lands of greater value than those which had been particularly mentioned.

But that, taking the word *elsewhere* in the most extensive signification, yet that was restrained by the subsequent words *not by him formerly settled, or otherwise disposed of;* and then the devise would run thus: "I devise all my lands and "hereditaments in *Littleton, Marston* and *Milbrooke,* and [59] "elsewhere, not by me formerly settled." Now these words *formerly settled* must be restrictive, and be intended to prevent some lands from passing by the will, which, were it not for this clause, would have been included therein; and consequently will prevent the passing of this reversion in fee. For surely, if the testator, or any one living, were asked, whether the lands in Sir *William Chester's* settlement were not settled, the testator and all mankind must answer in the *affirmative;* they were settled on Sir *William Chester*'s marriage, and if so, were not to pass by this will; for *only* the lands *not* formerly settled by the testator were to pass by this will; and though the *reversion in fee* was not settled, yet the *lands were,* and therefore must not pass.

That suppose the words of the devise were, "I devise all "my lands, *excepting the lands settled;*" this had been the same as if all the lands mentioned in the settlement made on the marriage of Sir *William* had been particularized in this exception; and if so, there had been no colour to think that the lands excepted should pass. And for this was cited, as an express authority, the case of *Hyly* v. *Hyly,* 3 *Mod.* 228. Also, if the testator had devised all his lands *settled* on his

son *William* on his marriage, this would certainly have passed the reversion of the lands thus settled; and it would be very strange, that the devise of the land *not settled*, and the devise of the lands *settled*, should receive the same construction, though they seem to be diametrically opposite.

That the inducement and occasion of the testator's making this devise was a plain indication of his meaning, and shewed he did not intend to pass the land settled on his son *William;* for the devise of all these lands was, to trustees for 100 years, in trust, out of the annual profits to pay his (the testator's) debts, remainder to the present Sir *John Chester* in fee. Now, nothing could be intended to be comprised in this remainder in fee to the present Sir *John Chester*, but what was comprehended in the term of 100 years, and *that* could not reasonably be supposed to include the lands comprised [60
in the beforementioned term of 600 years; besides, all these lands in Sir *William Chester's* settlement were limited to Sir *William* in tail male *general;* namely, in default of sons of *that* marriage, to him and the heirs male of his body; and it was not reasonable to make the reversion in fee a fund to pay debts, which was not so much as *assets* for that purpose.

Further: The trust is to pay debts out of the *annual rents* and profits, so that the estate is not to be sold, but only the annual profits to be applied: but surely the estate settled on the first and other sons of Sir *William*, whose lady was every year delivered of a child, till within a year of the death of the testator Sir *John Chester*, could not afford a yearly profit towards sinking the debt. That as to the case of *Strode* v. *Lady Russel*, 2 *Vern.* 621. (and which it was apprehended might be objected) where one devised all his lands and hereditaments *out of settlement* to his nephew *Strode, he taking upon himself the name of* Litton; there the condition of taking upon himself the name, shewed, he was to continue the family, and therefore to have the family estate, and consequently the reversion in fee of what was settled. Again, what further distinguished the principal case from that of *Strode* v. *Lady Russel*, and the several other cases in the books of that nature, was, that in the principal case there was an estate-tail in being in a *third person*, and not in the testator, by which means the reversion in fee not being assets was of no value in the estimation of law, and therefore ought not to pass by the general words

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of all the testator's lands and hereditaments *not otherwise settled.*

Lastly, It was observed, that a field called *Berry Field,* wherein were the conduit and water-pipes which supplied the capital messuage with water, (and which capital messuage was settled on the marriage of the eldest son *William Chester*) had by this will of Sir *John Chester* been devised to the eldest son *William and his heirs;* from whence it was said to be natural to infer, that the fee-simple of the *capital messuage* and the fee-simple of the *field* were not intended to be parted; consequently that the reversion in fee of the former was not intended to be disposed of from the heir at law to the present Sir *John Chester.*

One devises all his lands in A. B. and C. and elsewhere. The testator has lands in A. B. and C. and lands of much greater value in another county; the lands in the other county shall pass by the word "elsewhere."

But the Lord Chancellor and the Judges assistants were all clearly of opinion against the plaintiffs. They admitted that the heir is the universal representative of his ancestor, and by doubtful words ought not to be disinherited: but said the question here was, whether these words were doubtful? They thought not; that the word *elsewhere* was the same as if the testator had said, *he devised all his lands in the three towns particularly mentioned, or in any other place whatsoever;* and that there was no reason to reject so plain, proper, and intelligible a word in a will as this, which probably was inserted to avoid the prolixity of naming the several other towns in which the premisses lay, it being a great estate, and difficult, at the time of making the will, and when the testator might be supposed to have been *inops consilii,* and without his writings, to particularize all the towns. That the word *elsewhere* was therefore the most significant sensible and comprehensive word that could be used for that purpose, equivalent to the naming of them; and it would be of the most dangerous consequence, under pretence of construing this will, and assisting the testator's intentions, to reject a word so material to be made use of, both for the sake of brevity and security.(1)

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(1) So *Rooke* v. *Rooke,* Pre. Cha. 202. & 2 Vern. 461. S. C. *Kingsman* v. *Kingsman,* 2 Vern. 560. *Ridout* v. *Pain,* 3 Atk. 486. *Freeman* v. *Duke of Chandos,* Cowp. 360, 363. *Atkyns* v. *Atkyns,* Cowp. 808.(*x*) Vide tamen *Strong* v. *Teatt,* 2 Burr. 912, and 5 Bro. P. C. 496. S. C. (*y*)

(*x*) *S. C.* 1 Black. Rep. 200. *Fletcher* v. *Smiton,* 2 T. R. 656. *Sheffield* v. *Mulgrave,* 5 T. R. 571. *Roe* v. *Reade,* 8 T. R. 118. *Doe* v. *Meakin,* 1 East. 456. *Goodright* v. *Downshire,* 2 Bos. & Pul. 600. *Doe* v. *Weatherby,* 11 East. 322. *Attorney General* v. *Vigor,* 8 Ves. 256.

(*y*) *Goodtitle* v. *Miles,* 6 East. 494.

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That as to the case of Sir *Thomas Littleton*, cited on the other side from *Vern.* and *Vent.* the question there principally depended on the premises in controversy being a *mortgage*. Now an estate, though mortgaged, continues still to be the estate of the mortgagor, subject to the payment of the pledge which is upon it; and the mortgagee's right is only to the money due upon the land, not to the land itself; for which reason, till the mortgage is foreclosed, it is not properly the mortgagee's land, or to pass as such, by the devise of *all his lands*,(*u*) if the testator has other lands to satisfy the words of the will; and in the report of this case in *Ventris*, it is said, there were *some other circumstances* which shewed the testator did not intend to pass the mortgaged premises, and therefore the force of that authority is out of the case. That if the devise had been of all the testator's lands and hereditaments, (without saying more) and then had limited the premises to the trustees *for one hundred years*, remainder to Sir *John Chester* in fee, this had been good; the words *lands* and *hereditaments* would have passed the reversion in fee in the lands; and the words *not otherwise by me settled* could have excepted only *that estate in the lands* which was otherwise before settled: whereas it is plain that the reversion in fee was not settled and therefore would pass by the will; (*v*) the land can no further be said to be settled, than the estates therein are *exhausted:* but the reversion in fee of this land not being settled, the land, as to such reversion, is not settled; so that the same lands in several respects* may be said to be settled and unsettled, *(viz.)* with regard to all the estates exhausted, and of which particular estates are limited, the land, as to these estates, may well be said to be settled: though, in respect of the reversion in fee, it may properly be said the land is not settled. (*w*) That it was material, that this reversion in fee which remains unsettled, is part of the old estate; so that if the person making this settlement was seised in fee as heir on the part of the mother, he shall still be seised of this reversion as of his old estate, and as heir of the mother's side, as before. In like manner, if the lands were before *Gavel-*

The same lands may be said to be settled and unsettled; (*viz.*) settled as far as the use thereof is limited and, unsettled as to the reversion.

[*63]

The reversion in fee is part of the old estate; and if the owner had the land as heir of the mother, the same shall descend to the heir on the mother's side; so if it was borough English, or Gavelkind, it shall descend accordingly.

(*u*) *Thompson* v. *Grant*, 4 Mad. C C. 337.

438. (*w*) *Bland* v. *Bland*, 2 Cox 349.

(*v*) *Glover* v. *Spendlove*, 4 Bro.

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kind, or *Borough English*, this reversion, as part of the old estate, shall descend in *Gavelkind* and *Borough English* as before: wherefore, with regard to this reversion, the land is with strict propriety said to be unsettled, and the owner seised thereof as part of his old estate, his old property and *dominion*. Besides, nothing can be said to be settled, but what the party who made the settlement has not a power over; whereas the reversion in fee continues in the power of him from whom the estate first moved, and therefore cannot be said to be settled.

The Lord Chief Baron observed, that he looked upon the case of [E] *Wheeler* v. *Waldron*, to have been the first case of this nature, which had been adjudged, and is in *Allen's Reports*, 28. Next came the case of *Lidcot* v. *Willows*, which though adjudged otherwise in the reign of King *James* the Second, and about the same time with that of *Hyly* v. *Hyly*; yet afterwards, in the reign of King *William*, error was brought of the judgment in the case of *Lidcot* v. *Willows*, and the judgment *reversed*. See *Carthew* 50. 3 *Mod.* 229.; also, 2 *Vent.* 285. So that the case of *Hyly* v. *Hyly* may well be said not to be law, it being adjudged the same way, and about the same time, with that of *Lidcot* and *Willows*; and as the judgment of the latter was reversed upon error, so also would the former have been, had error been brought thereof; and that, agreeable to the case of *Lidcot* and *Willows*, was that of *Cook* v. *Gerrard*, 1 *Lev.* 212. (*x*) And the court laid great stress on the case of *Strode* v. Lady *Russell*, which was affirmed in the *House of Lords*, and as strong as the principal case, being a devise of all the testator's land *out of settlement*; which words were determined to pass *the reversion in fee* of the lands in settlement; observing, that this resolution bound them down in the principal case; and that the case of a son inheriting the honour must be as strong as that of a sister's son, who in the abovementioned case was the devisee of Sir *William Litton*.

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And as to what had been inferred from Sir *John Chester*

[E] The reporter here remarks, that in the case of *Ivy* v. *Ivy*, heard at the Rolls, Trinity, 1731, this case of *Wheeler* v. *Waldron* being cited, his Honour sent for the record; from whence it appeared to have been found by the special verdict, that, unless the reversion in fee passed by the will, there would not be sufficient to pay the testator's debts; which reason is not taken notice of in the book.

(*x*) S. C. 1 Saunders 180.

the testator's having devised *Berry Field* to *William Chester* and his heirs, *(viz.)* that the said field and the capital messuage were intended to go together, and not to be parted; the court took notice, this was but a slight circumstance, and that if there was any strength in it, then the field should have been devised to the same uses and to the same estates, as the capital messuage was limited by the settlement made on the said *William Chester's* marriage. Whereupon the decree was in favour of Sir *John Chester* the defendant, by the unanimous opinion of the Lord Chancellor, Lord Chief Justice, Lord Chief Baron, and Mr. Justice *Price*. (1)

CHESTER *v.* CHESTER.

(1) Reg. Lib. B. 1729. fol. 390.

BARLOW *v.* BATEMAN.

Case 16
[65]
Sir JOSEPH JEKYLL, Master of the Rolls.

Devise of a legacy to a feme on condition she marry a man of the name of Barlow. A. takes upon him the name of Barlow, and the feme marries him; this is a performance of the condition, and equity will not decree the husband to retain that name.

MR. BARLOW, of *Wales*, gave an additional legacy of 1000*l.* to his daughter, upon condition that she married a man who bore the name and arms of *Barlow;* and in case the daughter married one who should not bear the name and arms of *Barlow*, then the testator devised the 1000*l.* to the plaintiff. (1) The daughter married the defendant, whose name was *Bateman;* but about three weeks before the marriage he called himself *Barlow;* and it was said, that it was usual to have an act of Parliament to take a new name, which had not been done in the principal case. Besides, it was the intention of the testator, that the person who should marry his

(1) "Item, I give and bequeath to "my kinswoman, *Mary Barlow*, the "sum of 1000*l.* to be paid her at her "age of 21 years or marriage, which "shall first happen. Item, in case the "said *Mary Barlow* shall marry with "any person of the surname of *Barlow*, "then I give her the further sum of "1000*l.* to be paid her on the day of "such her marriage with a *Barlow* afore-"said; but if the said *Mary Barlow* shall "die unmarried, or shall marry a per-"son not bearing the surname of *Barlow*, "then I give the said last mentioned "sum of 1000*l.* unto *Charles Barlow*." The defendant *Robert Bateman* by his answer admitted, that *on the occasion of his marriage, and not before*, he assumed and took upon him the name of *Barlow;* that his father's name was *Bateman;* and that he assumed and took upon him the name of *Barlow, in order to entitle* him to the said sum of 1000*l.* devised to the said *Mary* upon the condition aforesaid.

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daughter, and be entitled to this additional legacy, should be one of his family, and have originally borne that name; whereas the defendant was of a family much inferior, and would, in all probability, as soon as he should have received the legacy, take again his true name of *Bateman;* wherefore the plantiff claimed the 1000*l.*

Master of the Rolls. The plaintiff would entitle himself to this legacy as a devise over, on a supposition that the daughter has forfeited it: but I am of opinion, that the condition is complied with, by the defendant's taking the name of *Barlow.* Surnames are not of very great antiquity; for in ancient times the appellations of persons were by their Christian names, and the places of their habitation; as *Thomas* of *Dale, (viz.)* the place where he lived. I am satisfied the usage of passing acts of Parliament for the taking upon one a surname is but modern; and that any one may take upon him what surname, and as many surnames as he pleases, without an act of Parliament.* Whereupon, though the plaintiff's counsel desired the court would direct, that the defendant should ever after retain the surname of *Barlow,* from an apprehension that he would, when he should have received the legacy, resume his old name of *Bateman;* yet his Honour refused to make any such decree.(1)

Anciently people were called by their Christian names, and the places of their births, as Thomas of D., &c. One may of himself, and without an act of Parliament, change his name, and take a new one.(*x*)

[*66]

(1) But upon appeal to the House of Lords on the 2d of *April,* 1735, his Honour's decree was reversed. 4 Bro. P. C. 194.(*y*)

(*x*) So *Doe* v. *Yates,* 5 B. & A. 544. *Leigh* v. *Leigh,* 15 Ves. 92. *Hawkins* v. *Luscombe,* 2 Swan. 375.

(*y*) *Pyot* v. *Pyot,* 1 Ves. Sen. 335.

1905. 2. K.B. 123.

John Roberts, Esq. and Catharine, his Wife, ... } Plaintiffs. Case 17.

David Roberts, Esq. the Son of the Plaintiff Roberts, ... } Defendant.

Sir Joseph Jekyll, Master of the Rolls.

A. treats for the marriage of his son, and in the settlement on the son there is a power reserved to the father, to jointure any wife whom he should marry, in 200*l.* *per annum*, paying 1000*l.* to the son. The father treating about marrying a second wife, the son agrees with the second wife's relations to release the 1000*l.* and does release it; but takes a private bond from the father for the payment of this 1000*l.*; equity will not set aside this bond, because it would be injurious to the first marriage, which being prior in time, is to be preferred.

[*67]

The bill was to be relieved against an underhand bond, dated the 1st of *February*, 1728, gained by the defendant, *David Roberts* the son, from the plaintiff his father, in the penalty of 2000*l.* for the payment of 1000*l.* within fourteen days after the date of the bond.

The equity was, that the bond was obtained by the defendant the son from the plaintiff *John Roberts* the father, in fraud of an agreement made on the marriage of the plaintiff *John Roberts* the father with the other plaintiff *Catherine* his second wife, and without the privity of her or any of her relations.

The plaintiff *John Roberts's* first wife, who was the defendant's mother, was a considerable heiress, and died leaving several children by the plaintiff. The defendant *David Roberts** was the second son; for whom the plaintiff his father bought a commission of lieutenancy in a company of dragoons; after which the eldest son dying, the defendant *David Roberts* the son intermarried with the sister of Mr. *Meller*, late one of the Masters of the Court of Chancery, who had a portion of 4000*l.* and *(inter al')* the plaintiff the father, who was tenant by the curtesy of all his wife's estate, joined in settling a good part of this estate on his son the defendant *David Roberts* in possession, and on his wife ——— *Meller;* the residue of the estate was limited to *John Roberts* the father for life, remainder to *David Roberts* the son, with a power reserved to *John Roberts* the father to settle 200*l.* *per annum,* (part of the premises limited to him for life) upon any wife which the plaintiff *Roberts* the father should marry, he the said *Roberts* the father paying, or securing, to the good liking of the defendant *Roberts* the son, 1000*l.*

The power in the settlement was penned in a strict manner, by way of condition precedent, *(viz.)* a proviso, that in case the plaintiff *Roberts* the father should pay to the de-

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fendant *Roberts* the son, or to his good liking secure to the said *Roberts* the son, 1000*l.* it should be lawful for *Roberts* the father to limit to any wife that he should marry lands of the value of 200*l. per annum*. There was also a power for the defendant *Roberts* the son to limit lands of 400*l. per annum* to any wife that the son should thereafter marry.

Afterwards the plaintiff *Roberts* the father entered into a treaty of marriage with the plaintiff *Catharine Barker*, the sister of *George Barker* of *Chiswick*, Esq. who had 3000*l.* portion; and thereupon the plaintiff *Roberts* the father proposed to settle these premises of 200*l. per annum*, upon the said *Catharine* his intended wife; but then it appearing, that
[68] the plaintiff *Roberts* the father was to pay 1000*l.* to his son *David Roberts*, upon his (the father's) making this jointure; and that the payment thereof would very much straighten the plaintiff *Roberts* the father; unless this 1000*l.* was released, the said plaintiff *Catherine* and her relations would not consent to the marriage.

Upon which the plaintiff *Roberts* the father applying to his son, and informing him where the marriage treaty stuck, (namely, at the father's paying this 1000*l.* to the son) and that it could not proceed, unless the son would release the same; the defendant *Roberts* the son did agree to release this 1000*l.*, in consequence whereof he wrote several letters to *Roberts* the father, intimating that he would release the 1000*l.* But it did not appear, that the son's wife, or any of her relations, were consenting to such release. However, the plaintiff the father introduced his son into Mr. *Barker's* company, on which occasion the son expressed himself pleased with the intended match; but not long after, the defendant *Roberts* the son began to recede from his promise, and insisted with his father, that if he the son released this 1000*l.* to the father, then the father should give him, the son, a bond for the payment thereof within a short time after the father's marriage; to which the father, being very much set upon this second marriage, did at length consent, *(viz.)* to give a bond to the son for the payment of the 1000*l.* upon the son's giving a release to the father: and the bond which the father was to give to the son, was, to pay the 1000*l.* to the son within a fortnight after the father's marriage. But this agreement for the father's giving the said bond to the son, was without the privity of the said *Catherine Barker* the intended wife, or any of her relations.

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Thereupon a release was prepared for this purpose, which *Roberts* the son did execute, and the father privately gave his bond for the payment of 1000*l.* to his son; but the release of the son not being thought effectual by the friends of the said *Catherine Barker*, another lease was prepared for him to execute, which accordingly *Roberts* the son did execute for this 1000*l.* but a day or two before the marriage; and the father did about the same time, or soon after, execute a new bond to the son; but this bond as the former, was given by *Roberts* the father without the privity of *Catherine* his intended wife, or any of her relations.

The marriage between *Roberts* the father and the said *Catherine* took effect, and the portion of 3000*l.* was paid. Afterwards the defendant *Roberts* the son sued his father on this bond for 1000*l.* upon which the father *Roberts* brought a bill in equity against his son, and on motion before the Master of the Rolls, had an injunction on the merits: and now between the seals after *Trinity* Term, the cause came on to be heard at the Rolls. When

On behalf of the plaintiffs it was insisted, that it was plain this bond for the 1000*l.* in question, was obtained from the plaintiff *Roberts* the father without the privity of the plaintiff *Catherine* the wife, or any of her relations; that it seemed as plain, that neither *Catherine* the wife, nor any of her relations, would have consented to the match, had they known of this underhand bond being given by the plaintiff *Roberts* the father to the defendant his son; which appeared still more evidently by the great caution made use of by the plaintiff *Catherine* and her relations, in excepting to the first release executed by the defendant *Roberts*, as not sufficient and effectual; and in insisting upon another release which was thought more effectual, and had been executed by the defendant *Roberts* the son; that whenever any of these underhand agreements on marriage came in judgment, the court constantly declared an abhorrence of them, as being in fraud of the marriage, and generally tending to make the marriage unhappy; and that every thing which had, or seemed likely to have, those effects, ought highly to be discouraged. [70]

That for this reason equity is careful that the open and public contract made upon the marriage should take place, and will not suffer that to be infringed by any clandestine and private agreement whatever; nay, so odious in a court

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of equity are all secret and underhand dealings, as to entitle to relief even the husband himself, though party to the fraud and consenting to the agreement: but in the principal case, the bond given by the husband for the payment of the money, did in consequence affect the wife. 1000*l.* was a considerable sum of money, for which when the husband should be called upon, he must be disabled thereby from maintaining his wife, at least in so comfortable a manner as otherwise he might, and probably would have done, and therefore it was proper the wife should be, as here she was, a co-plaintiff, in order to contest and set aside the bond.

That it was true, the bond in question was only for 1000*l.* but it might have been for 10,000*l.*; and if the present bond for 1000*l.* were allowed to be good, by the same reason a bond for 10,000*l.* had been good also, which must utterly have incapacitated the plaintiff *Roberts* from maintaining his
[71] wife, who must in such case have gone back to, and been a clog upon, her relations, although she had brought so considerable a portion as 3000*l.*

It was admitted to be in proof, that the plaintiff *Roberts* the father did in all outward appearance execute this bond *freely*. But this was not at all material; for still it was a clandestine bond, given without the privity of the wife or her relations; and would, as was before observed, if discovered, in all probability have prevented the marriage.

That innumerable precedents might be alleged, where the husband not only was *passive* in consenting to the underhand agreement, but had also been *active* in encouraging it; and yet had been relieved against his own act, fraud, and contrivance; which doubtless was done in favour to the wife, and to the end her husband might not thereby be disabled from the better maintaining her, who in the present case was not pretended to have known any thing of the bond, but to have been entirely innocent, and free from the least imputation of fraud.

And as to the jointure made upon the wife in this case, it was said to be a hard bargain, being but a jointure of 200*l.* *per annum*, for 3000*l.* portion: whereas it is usual to settle 100*l.* *per annum* for every 1000*l.*; and this 200*l.* *per annum* lay at a great distance, in *Wales*, without any the least provision for the children of the marriage.

That with regard to the father's power reserved to him to make a jointure, it was observable, he was made to pay

1000*l.* for it, for a power to limit only an estate for life, and this in reversion too, after another life: so that if *Roberts* the father should happen to survive his wife, it would have been paid for nothing; that it was at the rate of five years' purchase, which was holding him to rigorous terms, especially when at the same time the son was intrusted with a power of making double that jointure being allowed to make a jointure of 400*l. per annum*, without paying one farthing for it.

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It was admitted this was a bond given by the father to the son, not by the son to the father; so that the usual argument of its having been given by compulsion or coercion might seem not applicable in this case: but still the fraud was not the less upon the plaintiff *Catherine*, who was entirely innocent, and kept in ignorance of it. The wife was equally a sufferer, and her relations imposed on to as great a degree, as if she had been the wife of the son, not of the father. And as to authorities, they were very strong, as in 1 *Vern.* 348. *Redman's* case; so 1 *Vern.* 475. *Gale* v. *Lindo*; in which cases the wife as well as the husband was *particeps criminis*, and yet relieved. The same in [A] *Turton* v. *Benson*, 2 *Vern.* 764. Wherefore it was prayed, that as the court formerly ordered an injunction till the hearing, so they would now grant a perpetual injunction.

On the other side it was urged, that in the principal case the plaintiff *Roberts* the father was not only party to what was here called the fraud, in giving this underhand bond for the payment of the 1000*l.* but that, upon the defendant *Roberts* the son's marriage, when he reserved to himself a power to make a jointure of 200*l.* to any wife whom he should thereafter marry, he himself made a private agreement with his son, that the latter should release this 1000*l.* to him; and the very bill sets forth, that the son the defendant *Roberts*, at the time when he made his marriage [73] settlement, did declare before several persons, that he would not insist upon such claim, nor expect payment of the 1000*l.*

So that all that could be alleged in favour of the second wife of the plaintiff *Roberts* the father, might likewise be said on behalf of the wife of the defendant *Roberts* the son; and if it should be insisted to be injurious to the plaintiff *Catherine*, the second wife of the father that this private agreement should take place; it must be allowed to be no less prejudicial to the wife of the son, that the private underhand agreement

[A] See vol. 1. 498. where there is a note referring to this case.

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for the releasing, or not insisting on the payment of the 1000*l.* on the father's making a jointure on the second wife, should hold good; and it was plain that the agreement on the marriage of the son, that the father, if he settled a jointure on a second wife, should pay 1000*l.* was made on a valuable consideration, and with a view to prevent the father's marrying again. Then if the plaintiff *Roberts* the father, had not an undoubted equity on his side, and the law should be in favour of the defendant *Roberts* the son, (as clearly it was, the bond being good at law,) the son's bond must prevail.

That as it appeared from the son's settlement, that this provision was made at the instance of the first wife's friends, that, if the father married again, he should, on his making a jointure on a second wife, pay 1000*l.* to the son; the second wife or her friends ought to have applied to the relations and trustees under the first settlement, and to have given them notice of this intended release of the 1000*l.* they being in some measure, in equity, interested therein.

[74] [Here the court proposed it to the plaintiff's counsel, whether they had known or could cite any precedent of an underhand agreement to give a bond on a marriage being set aside, which when done, would be injurious to a former agreement made upon a valuable consideration.

To which it was answered, that whatever agreement or promise the son might make to the father of his not insisting to be paid this 1000*l.* on the father's second marriage, yet it did not appear that the father ever required a bond or covenant from the son to oblige him to it; and as to any verbal agreement to that purpose, supposing there were any such, the son must know it would not be binding; and it would be hard that this agreement for the father's giving a bond to pay this 1000*l.* to the son (which was plainly an underhand bond) should be binding to the prejudice of the father's second wife, who brought a good portion, and was at least herself innocent of any fraud, whatever imputation of that kind might lie on the husband.]

Master of the Rolls: It is most true that equity does abhor all underhand agreements (1) in cases of marriage; and per-

(1) So *Arundel* v. *Trevillian*, 1 Chan. Rep. 47. *Drury* v. *Hooke*, 1 Vern. 412. *Smith* v. *Bruning*, 2 Vern. 392. *Stribblehill* v. *Brett*, 2 Vern. 446. *Smith* v. *Aykwell*, 3 Atk. 566. *Cole* v. *Gibson*, 1 Ves. 503. which are cases of direct marriage brocage; and in the case of *Shirley* v. *Martin*, in the Exchequer, on 14th *Nov.* 1779, the court was of opinion, that contracts of this nature being avoided on reasons of public inconvenience, would not ad-

haps, this may be the only instance in equity, where a person, though *particeps criminis*, shall yet be allowed to avoid his own acts. Marriages ought to be encouraged, to which end the open and public agreements on marriage treaties should be supported and made good. It is not usual in cases of this nature for the wife to be made a co-plaintiff with the husband, in order to avoid the agreement, but the husband has been relieved on a bill brought by him alone. And therefore I do not think that the wife's joining in this bill at all alters the case. Neither does it make any difference, that the *father* seeks here to be relieved against the bond. No evidence has been given of his having made use of his paternal authority, and the father is as much at liberty to marry again as the son.

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But what I take to be material is, that whatever arguments can be made use of in favour of the plaintiff *Catherine*, the father's second wife, or of her husband, to prove that the father ought to be *discharged* of the bond for payment of the 1000*l.*, the very same arguments may be urged on behalf of the son and his wife, to prove that it ought to be *paid*. Thus supposing it to be an hardship upon the father's second wife, that her husband should be forced to pay this 1000*l.* in

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mit of subsequent confirmation by the party.(*x*) So, any private agreement or treaty infringing the open and public agreement or marriage, is considered as fraudulent. *Peyton* v. *Bladwell*, 1 Vern. 240. *Redman* v. *Redman*, 1 Vern. 348. *Gale* v. *Lindo*, 1 Vern. 475. *Lamlee* v. *Hanman*, 2 Vern. 499. *Keat* v. *Allen*, 2 Vern. 588. *Webber* v. *Farmer*, 2 Bro. P. C. 88. *Morrison* v. *Arbuthnot*, 1 Bro. C. C. 548. note. *Pitcairne* v. *Ogbourne*, 2 Ves. 375. In *Neville* v. *Wilkinson*, before Lord *Thurlow*, in *November* 1782, his lordship said he would not lay it down as a rule, that fraud in cases of this nature must be upon an article *expressly contracted for*, but any representation misleading the parties contracting on the subject of the contract, was within the principle of the other cases, and his lordship relieved by injunction against a bond entered into by the plaintiff to the defendant before the plaintiff's treaty of marriage, the defendant having by the plaintiff's desire, upon the occasion of such treaty, misrepresented to the wife's father the amount of the plaintiff's debts, and particularly concealed from him the bond in question; and this relief was given, although it did not appear that there was any actual stipulation on the part of the wife's father, in respect of the amount of the plaintiff's debts. 1 Bro. C. C. 543. S. C.—Vide etiam *Key* v. *Bradshaw*, 2 Vern. 102. Duke of *Hamilton* v. Lord *Mohun*, ante, 1 vol. 118. *Woodhouse* v. *Shepley*, 2 Atk. 535. *Blanchet* v. *Foster*, 2 Ves. 264. *Montefiori* v. *Montefiori*, 1 Bla. Rep. 363. *Jackson* v. *Duchaire*, 3 T. R. 551.(*y*)

(*x*) See this case stated in 1 Ba. and Be. 358.

(*y*) *Scott* v. *Scott*, 1 Cox 366. *Ex-parte Gardner*, 11 Ves. 40. *Palmer* v. *Neave*, 11 Ves. 165. It is a rule in cases of frauds on marriage that although the husband were a party to such fraud, yet his interest is not to be affected where there is a wife or child who would also be affected, *Thompson* v. *Harrison*, 1 Cox 344.

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breach of the public and open agreement made by the son; is it not equally an hardship upon the son's wife, and as much a violation of the open and fair agreement made on *her* marriage, that the 1000*l.* should *not* be paid upon the father's making a second jointure? The consequence of which will be, that as the agreement on the son's marriage was the *first*, it ought to have the preference. *Qui prior est in tempore, potior est in jure.*

Further: On the face of the bill it is alleged, that the son on his marriage, and when his father agreed to pay the 1000*l.* on his making a jointure to a second wife, engaged not to insist on, or expect the payment thereof; which shews it was intended as a fraud upon the son's wife, or her relations; and the father's agreeing to pay the 1000*l.* on such contingency, might be some inducement to the son's wife and her relations to come into the match. But if this had not been charged in the bill, it still appears on the merits, that the defendant *Roberts* the son and his wife are purchasers of the 1000*l.* in

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case of the father's marrying again and making such jointure, as he has done. Wherefore, since the payment of this 1000*l.* by *Roberts* the father, may as much contribute to the comfortable subsistence of *Roberts* the *son* and *his wife*, as the *non-payment* of it may conduce to the comfortable living of the *father* and *his wife;* and as by means of this bond, *Roberts* the son has the law on his side, I think the bond must be paid; and the only relief I can give the *father* is, to award a perpetual injunction, upon payment of principal, interest and costs (1).

In this case the Master of the Rolls observed, that the practice of the court, in relieving against all marriage-brocage bonds, plainly shewed it to be their opinion, that every contract relating to marriage, ought to be free and open; and he took notice, that in the case of (*a*) *Potter* v. *Keen*, where there was a bond to pay money for procuring a marriage, the Lord *Sommers* decreed in favour of the bond, conceiving, that as the procuring a marriage was a good consideration at law for an *assumpsit*, so, provided the bond were in a reasonable sum, the same might be a good consideration for a bond in equity. But that the Lords, with great justice, reversed the Lord *Sommers's* decree, for that it would be of dangerous consequence to allow of any such bonds, as tending to introduce many improvident marriages.

(*a*) Ca. in Parl. 76. et vide Law *v.* Law, post 391.

(1) Reg. Lib. B. 1729. fol. 324.

DE

TERM. S. MICHAELIS, 1730.

3. Bea. 379

SHIRLEY ET AL'. *v.* EARL FERRERS.

Case 18.

ROBERT late Earl *Ferrers* was seised in fee (among many other estates) of lands in *Ireland* of 2000*l. per annum*: and having several sons by his first wife, (*viz.*) *Washington*, &c. and also having several sons by his second wife, (*Silena*, the present Countess dowager *Ferrers*,) the said Earl *Robert* by a settlement had limited these premisses in *Ireland*, to his sons by his last lady, the Countess *Silena*. Upon the death of Earl *Robert*, the earldom descending to *Washington* Earl *Ferrers*, his lordship claimed title to the premisses in *Ireland*, by virtue of a prior settlement made thereof by Earl *Robert* in *May*, 1683, whereby the premisses were limited to himself for life, remainder to his son *Washington* for life, remainder to his first, &c. son in tail male, remainder to every other son of Earl *Robert* in tail male successively, remainders over. And it being insisted on by the sons of the second marriage, that this was a forged deed, an *issue* was directed to try the same. Earl *Washington* died without issue male, and the earldom descended to the defendant. This suspected deed of *May* 1683, had been brought before the Master by Earl *Washington;* and the younger sons by the second marriage and their agents, having inspected it in the Master's hands, one *John Shirley*, born in *Ireland*, and to whom Earl *Washington* had shewn several favours, came to the Master to see the deed, and made an affidavit, that in *December* 1720, the deponent himself, by order of Earl *Washington*, transcribed this supposed deed from another copy in parchment; and that, at that time, there was no

Lord Chancellor KING.

Mos. 389. A witness ordered to be examined de bene esse where the thing examined into lay only in the knowledge of the witness, and was a matter of great importance; though the witness was not proved to be old or infirm.

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SHIRLEY v. Earl FERRERS.

seal, or name subscribed, nor any witnesses to it; whereas, now it appeared, that this very deed had a seal put to it, and Earl *Robert's* name and title subscribed to it, and three witnesses' names indorsed, though those witnesses' names were almost rubbed out.

The sons by a second marriage thereupon brought a supplemental bill setting forth this matter, with *John Shirley's* affidavit annexed; and praying that they might be at liberty to examine this witness, in order to have his testimony perpetuated. And now it was moved, that the plaintiffs might examine this witness, *de bene esse*, the defendant having prayed a commission to answer.

On the other hand this was opposed on behalf of the Earl, by reason there was not the common affidavit, that the witness was old, or infirm, or in any danger of dying: and it was said to be against the constant course to grant such motion, but upon very full affidavits of the witness's not only being old, but also infirm, and in danger of dying.

But the Lord Chancellor, (after this had been twice moved) on affidavit made, that no other person was privy to
[79] this matter, as the plaintiffs knew or believed, did order that the plaintiffs should be at liberty to examine this witness *Shirley de bene esse;* in regard *he*, as well as all others, might die, and by that means the plaintiffs might be deprived of his testimony; and for that this matter lay in the privity of this witness (1) only, and was of great importance; but that if he were then living, the plaintiffs should produce him at the trial. (2)

Afterwards, on the trial of the issue, at the bar of the King's Bench, *Hilary*, 1730, the deed was found to be forged, upon the evidence given by this witness. (*z*)

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(1) So, *Pearson* v. *Ward*, in Cha. *Feb.* 28, 1785. (*x*) *Brydges* v. *Hatch*, in Cha. *Jan.* 19, 1788. (*y*)

(2) Vide *Philips* v. *Carew*, ante, 1 vol. 117.

(*x*) 2 Dick. 648. 1 Cox, 177.

(*y*) 1 Cox 423. *Hankin* v. *Middleditch*, 2 Bro. C. C. 641. *Cholmondeley* v. *Oxford*, 4 Bro. C. C. 157.

(*z*) See *Dursley* v. *Fitzhardinge*, 6 Ves. 254.

JONES *v.* EARL OF STRAFFORD, ET AL'. Case 19.

Lord Chancellor KING. Lord Chief Justice RAYMOND. 2 Eq. Ca. Ab. 253. pl. 11.

THE plaintiff, as administrator during the minority of four infant children, of the goods and chattels of one *Bromell*, who died intestate, brought his bill to recover a debt by bond for 2000*l.* dated so long since as 1685, and a debt by note for 800*l.* dated so long since as 1686, both pretended to have been given by Sir *Henry Johnson*, knight. The bill alleged, that Sir *Henry Johnson* by his will had subjected his lands to pay his debts, and was brought by the plaintiff against the defendant the Earl of *Strafford*, as administrator, with the will annexed of Sir *Henry Johnson*, (on the executor's renouncing) and against his heir at law and devisee; and it appeared by the bill, that one of the said four infants, being the eldest, and a daughter, was married to *J. N.* who was of age, and a co-plaintiff, and who sued as one of age, and not by his *prochein amy* or guardian.

1. Russ the. 274

The defendant the Earl of *Strafford*, as to that part of the bill which sought to recover the 2000*l.* of the money due on the said bond, or the money due on the said note from the said Sir *Henry Johnson*, or the defendant as his administrator, or which sought any relief in relation thereto, or any discovery in order to such relief, *demurred;* for that it appeared on the face of the bill, and of the plaintiff's own shewing, that as the plaintiff's title was only as administrator of *Bromell*, so the administration was determined by the infant daughter's having married an husband who was of age; also, as to such part of the bill as sought to recover the 800*l.* or money due on the note pretended to have been given in 1686, the said defendant *pleaded* the *statute of Limitations*, and shewed, that the debt was barred by the statute; and that six years and upwards had incurred, long before the said *Sir Henry Johnson* had made his will, whereby he charged his lands with the payment of his debts.

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Moreover, as to that part of the bill by which the plaintiff sought to recover the money due on the bond, the defendant pleaded; that the plaintiff had brought an action of debt on the bond, in the court of Exchequer against the defendant,

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who had pleaded *solvit ad diem*, and that the said action was still depending: and to some immaterial part of the bill, the defendant put in a short answer. These pleas, together with the demurrer, coming on to be argued, the Lord Chancellor called the Lord Chief Justice *Raymond* to his assistance.

A defendant cannot demur and plead, or demur and answer to the same part of a bill; for the plea, &c. overrules the demurrer.(*x*)

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And it was objected to the demurrer, which was said to be in effect to the whole bill, that the same was over-ruled by the pleas, and also by the answer; and that this was the proper conclusion of all demurrers, *(viz.)* to demand judgment of the court, that the defendant ought not to answer to what the demurrer extends to: now the demurrer extending to any relief, as to the bond or note, or any discovery in relation thereto, and the defendant afterwards pleading the statute of limitations as to the note, and the action at law, as to the bond; these pleas (it was said) overruled the demurrer: for the plaintiff might reply to the pleas, and thereupon examine witnesses, and hear the cause; so that the pleas were as an answer, and sworn as an (*a*) answer. And upon time granted to answer, the defendant may plead; wherefore it must be inconsistent for a man to say, "I demur, and there-"fore ought not to answer," and yet at the same time to answer; consequently, a defendant cannot plead and demur to the same part of the bill; and as answering to the same thing overrules a plea, so *à fortiori* pleading or answering to the same thing overrules a demurrer.

(*a*) Vol. 2. 464.

And of this opinion were the court, *(viz.)* that the pleas overruled the demurrer. But still it appearing that the infant daughter was married to one that was of age; if thereby the administration was determined, the court said they would not proceed in a suit, where it was evident the plaintiff claimed under an administration which was at an end.

An administration is granted during the minority of four infant children, one of whom being a daughter, marries an husband, who is of age; the administration is not determined.

Whereupon for the demurrer it was insisted, that the question was no more than this: an administration was granted of the personal estate of an intestate during the minority of four infants, one of whom (being a daughter) had married an husband who was of age, whether this determined the administration? now, the only reason of granting such administration during the minority of the infants, was, because none of the parties interested were capable of administering, on

(*x*) *Dormer* v. *Fortescue*, 2 Atk. 90. *Tidd* v. *Clare*, 2 Dick. 712. *Atkinson* v. *Hanway*, 1 Cox 360 282. *Savage* v. *Smalebrooke*, 1 Vern.

account of their tender age: but when one of these had married a husband that was of age, there was then a party interested, who was capable of administering; by which means, as the reason of granting the administration ceased, so must the administration also. *Cessante causâ, cessat effectus.* That the husband was not only a person *capable* of administering, but the *proper* person to manage, at least his wife's share of the personal estate, which seemed all of it to be now vested in him; but most certainly he had a power of disposing of it: so that the administrator *durante minori ætate* had no longer the property, nor any right to the possession thereof. And why should his administration continue, when there was nothing left for him to administer? That it might be thought sufficient for the defendant to shew, that the said administration was determined, without pointing out to whom administration should now be granted. However, it was conceived, that as the married daughter's share of the personal estate belonged to her husband, so *he* should have administration granted to him of such share; and that a different administration might be granted to another person during the minority of the other three infants, *ad usum et commodum* of these three infants.

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Neither was it material, that this husband who had married the infant daughter was before the court, and a party to the bill: for if the administration was determined, then the plaintiff's right to sue *as administrator* during minority, &c. was at an end: of which the court would take notice, and not suffer a suit to proceed, where there was no representation of the personal estate in question, no representatives of the infants to whom these securities now in controversy (if subsisting) did belong: that it was very true, there were three children of the intestate that were infants under the age of seventeen, besides the daughter who was married; but that would not help the case; because where an administration is granted during the minority of four infants, if one of the infants comes of age, this does determine the administration, 5 *Co. Brudenel's* case, 1 Leon. 74. agreed by the counsel on each side; nay, the case is there put further, *(viz.)* that if administration be granted during the minority of four infants, and one of the infants *dies*, this determines the administration, in regard it cannot be said there are four infants, when one of them is dead. *Lastly*, that *Prince's* case, in 5 *Co.* 29. was very strong in favour of the demurrer,

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where there being an infant executrix under seventeen, administration was granted to *J. S.* during her minority; and the administrator during minority sold a term for years; *adjudged* such administrator could *not* sell the term; and further, that the administration determined on the executrix's marrying, *if it appeared that the husband was of age.* So that one of the points then *judicially* before the court, was, whether the administration during the minority, &c. was not at an end by the executrix's marrying; and it was *held*, that the marriage of the infant executrix to a man of age, was a determination thereof; and the reason given is, for that the executrix had taken a husband, who (as the book says) might administer as executor. Which same resolution is mentioned and allowed in *Godolphin's Orphan's Legacy* 231, and in *Swinburne* 286; and in those books it is said, that where an infant executrix takes a husband, who is of age, it is the same thing as if she herself were of age. And in 1 *Vent.* 103. the same is cited for law by that learned Judge Mr. Justice *Twisden.* So that from the reason of the thing, and from the authorities which were conceived to be in point, the administration *durante minori ætate*, and consequently the plaintiff's title to sue, was said to be determined; and surely, in the case of so stale a demand, the plaintiff ought to be held strictly to every thing, though but matter of form.

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As to the next point, which was upon the plea of the statute of limitations with regard to the pretended note for 800*l.* from Sir *Henry Johnson* to the plaintiff's intestate *Bromell*, and which was dated so long ago as the 30th of *May*, 1686, (above forty-four years since,) it was admitted, that Sir *Henry Johnson* did by his will subject his real estate to the payment of his debts; yet the six years, and many years beyond that period, having incurred after Sir *Henry's* having given the said note, and before his making his said will, this which was a debt by simple contract, was said to be barred by the statute, and to have become as no debt, and consequently neither revived nor aided by Sir *Henry's* will; and that there was a most manifest difference between this and the case lately in the *House of Lords*, in which the Lord *Strafford*, the now defendant, was appellant against one *Blakeway*. It is true, the said *Blakeway* was a simple contract creditor of Sir *Henry Johnson* by a stale note: but it was suggested in (*a*) that bill, and made part of the printed

One owes a debt by simple contract, six years pass whereby the debt is barred; after which the debtor by will charges his lands with the payment of all his debts, and dies; it seems this debt is revived.

(*a*) Vol. 2. 373, 374.

case, that the said Sir *Henry*, within five years before the making of his will, and his death, had paid to the said *Blakeway* part of the monies due on the note then in question, which was insisted upon as an acknowledgment of the said debt, and has alone been adjudged to revive a debt, and to be evidence of a new promise to pay it. Wherefore (if the allegations were true) that debt was in fact subsisting at the time of making Sir *Henry Johnson's* will for payment of his debts, and consequently must be within the trust not barrable by the statute of limitations, though after never so great a length of time; which is carrying the statute far enough in all conscience: but in the present case the debt by simple [85] contract was completely barred by the statute of limitations before the making of Sir *Henry Johnson's* will; consequently, it was then no debt, neither had there been any manner of excuse offered, whereby to alleviate and take off the objection of this great length of time. And if it should be contended, that the statute of limitations only bars the *remedy* for the recovery of the debt; but that the debt in equity and conscience remains still; the answer is, that the statute of limitations holds on a presumption that the debt in this great length of time has been paid and satisfied; but that the party is by death deprived of his evidence proving the same, which he could not keep alive; or by the mislaying of the receipt, release, or other voucher of payment; and if the Parliament in this great length of time presumes a debt to be paid, why should not the courts in *Westminster-Hall* make the like presumption? That there is no such thing in law as a right remediless; wherever there is a right, the law giving a remedy, *Salk.* 21, 415. Besides, as the remedy, suit, or action in the present case was admitted to be barred by the statute of limitations, this made the case as strong, as if the party creditor, to whom the debt by simple contract was due, had, after the six years incurred, whereby the debt was barred, released to the debtor all actions and suits, both at law and in equity, which would certainly have barred the debt; nor is it credible, if, after the giving of such a release, the debtor had made such a will as Sir *Henry Johnson* had done in the present case, whereby he had charged his real estate with the payment of his debts, that the said debt by note would have been thereby revived.

That it would be a thing of the most mischievous conse- [86] quence imaginable, to construe the testator's will in such a

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sense; and would prove an invitation to creditors of the longest standing, after ever so great a length of time (especially if such creditors happened to be poor and necessitous) to bring in their stale and satisfied debts, in order to a double payment; and the present case was still the harder, it not being the case of an executor, who might be presumed to have been acquainted with the testator and his affairs, but of an administrator, who by his answer had sworn himself an utter stranger to all of them.

Then, as to the other plea, (*viz.*) to that part of the bill which sought satisfaction of the bond out of the real and personal assets of the testator Sir *Henry Johnson*, the defendant had pleaded, that the plaintiff the administrator had brought an action of debt on this bond in the court of Exchequer, to which action the defendant had pleaded *solvit ad diem;* and that the said action is still depending. Now, as this was a fair issue tendered on the point of payment, and to which the matter must at length one time or other come, if the plaintiff would be so hardy as to venture it, why should not the court stop here, and prevent further charge on both sides, by ordering the parties to go to trial upon such issue? And if the plea of *solvit ad diem* were true, then the debt being once paid, the plaintiff could be entitled to no discovery of assets or relief; neither could it be any objection, that the defendant had pleaded doubly in the action brought in the Exchequer, (*viz.*) a special *plenè administravit* also, by setting up several debts, *ultra quæ* the defendant had not assets: for if this were true, the court could not take any notice of it, in regard they cannot take notice of any thing but what is contained in the plea; nor
[87] could the plaintiff in the principal case be prejudiced thereby, since he might amend his bill, and charge this plea by the amended bill, praying a discovery whether these pretended debts were real and just debts, or not.

With regard to the first point, the *Lord Chancellor* and *Lord Chief Justice* were of opinion, that the administration taken by the plaintiff to *Bromell*, during the minority of the four children, *donec aliquis eorum* should attain to twenty-one, did *not* determine on one of these children marrying a man of full age; for that the husband of such child had no right to administer, because not of kin to the intestate; and when the eldest daughter arrived to twenty-one, though she should be married, yet administration must be granted *to her*,

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and not to her husband. That upon the reason of the thing the administration must continue, there being no other person capable of administering; neither was the wife's share of the personal estate by the marriage become vested in the husband, for there might be debts which must be satisfied before it could be known whether the wife had any and what right thereto: and after that, it could be but a *chose en action*, which would not vest *absolutely* in the (*a*) husband by the marriage; that as to the special administration *quoad* the wife's share to be granted to the husband, it was plainly impracticable; since it must be a fourth part in specie of all the personal estate, which might consist of several entire things, such as horses, cows, and sheep; and then the husband must have a fourth of every horse, cow, &c. of the intestate; and by the same reason, all bond and simple contract debts must, as to a fourth part of them, be vested in the husband, which would render it impossible to put them in suit, because the husband could not sue for a fourth part of them only; and their lordships strongly inclined against the opinion reported by the Lord *Coke* in *Prince's* case, which says, that where an infant executrix is under seventeen, and an administration is granted; if such infant executrix marries an husband of age, the administration is determined: this opinion their lordships strongly inclined against, the same not being taken notice of in other cotemporary reports, as in 2 *And.* 132. *Cro. Eliz.* 718, 719. and 3 *Leo.* 278. in all which books *Prince's* case is reported; and it is remarkable, that the author of the book intituled *The Office of Executors*, *p.* 213. mentioning this opinion, a little *marvels* thereat, considering (as he observes) "that these "things are managed in the spiritual court, and by that law, "[the canon] which intermeddles not with the husband in "the wife's case, and since by that law, and not our com- "mon law, comes in this limitation of seventeen years. He "adds, that he has seen that case otherwise reported in this "point."

(*a*) Post, 197. Lord Carteret v. Paschall.

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Where an infant executrix being under 17, administration is granted, and the infant marries an husband of age; this does not determine the administration, by the Lord KING, Chancellor, and RAYMOND, C. J. contrary to the opinion in 5 Co. which seems to have been extrajudicial, and is not taken notice of by cotemporary reporters.

Besides, that part of the case was at least an extrajudicial opinion not necessary to be determined, the principal question being only whether such a special administrator could assign over a term for years which belonged to the testator? And resolved he could not, which certainly is good law. However, taking the above-mentioned point in *Prince's* case to be law, yet it differed, they said, from the case now be-

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fore the court; for where an administration determines by the marriage of an infant executrix to one of age, in the same manner as if the executrix herself were of age, there is then a certain known person to administer, (to wit) the feme infant, (the husband being incapable of proving the will) and it is the case but of *one* minor; whereas in the principal case it could not be known who was to be the administrator, or whether there was any other more proper for that office than the person already appointed during the minority; for the husband being not entitled to have the administration granted to him, it was in the discretion of the ordinary to grant it to whom he pleased, this sort of administration (*a*) not being within the statute; and they further held, contrary to one of the resolutions above-mentioned in *Brudenel's* case, that if administration should be granted during the minority of four infants, one of whom should die before he comes to age; this would not determine the administration; for the living infants would not be of age, and the other dying during his infancy, and not being *in esse*, would be as out of the case.

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So if administration be granted during the minority of four infants, and one dies; this don't determine the administration; contrary to the opinion in 5 Co. Brudenel's case.

(*a*) 1 Vent. 219. per Hale, C. J.

Secondly, Touching the plea of the statute of limitations, where the testator, after six years incurred, makes his will, and charges his lands with the payment of his debts; the court observed, it had been held that such will revives [A] the debt, in regard the same, though the six years are passed, continues still to be a debt in conscience; and a defendant may, if he pleases, waive the benefit of the statute. However, it having in a former cause of the Lord *Strafford's*, brought before the *House of Lords* on a like point, been ordered, that the plea should stand for an answer; the like order was made in the principal case. (1) And,

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In relation to the third point; the *Lord Chancellor* and

[A] *Quære*, If a man were to devise his *personal* estate in trust to pay his debts, whether would this, as creating a trust, revive a debt barred by the statute; or would not such devise be merely void, as saying no more than the law of course says, (*viz.*) that a man's personal estates shall pay his debts? And if the testator should say that his personal estate shall *not* be liable to pay his debts, or that his *book* debts shall be paid thereout before his *bonds*, such will would be plainly void.

(1) Reg. Lib. A. 1730. fol. 515. But no farther proceedings appear to have been had either in this cause or in *Blakeway* v. Earl of *Strafford*, (ante, 2 vol. 373): but as to this point vide *Anon.* 1 Salk. 154. *Gofton* v. *Mill*, 2 Vern. 141. *Andrews* v. *Brown*, Pre. Cha. 385. *Vaughan* v. *Guy*, Mos. 245.

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Where the plaintiff sues both at law and in equity for the same thing, he will be put to make his election in which court he will proceed; but need not however make such election till the defendant has answered.

Chief Justice were clear, that the plea ought to be overruled, as being, in effect, only a plea of another action depending in another court for the same thing; and that therefore the plaintiff ought to make his election [B] in what court he would sue, which election no plaintiff is bound to make, until the defendant has answered. (*z*)

[B] The order for making an election recites only, that the plaintiff prosecutes the defendant at law and in equity for one and the same matter, so that the defendant is doubly vexed; wherefore it provides that the plaintiff, his clerk in court and attorney at law, having notice of the order, do within eight days after such notice make his election in which court he will proceed; and if he elects to proceed in this court (the Chancery) then the proceedings at law are by that order to be stayed by injunction. But if the plaintiff shall elect to proceed at law, or in default of such election by the time aforesaid, his bill is to be dismissed with costs. And note; if one makes a *special* election to proceed at law, as to part, and in equity as to other part; with regard to what the plaintiff in equity elects to proceed at law, his bill ought to be dismissed with costs. By Sir *Joseph Jekyll*, Master of the Rolls, *Michaelmas* 1723. *Anonymus.* (*y*)

Legastick v. *Cowne*, Mos. 391. *Lacon* v. *Briggs*, 3 Atk. 107. *Truman* v. *Fenton*, Cowp. 548. *Oughterlony* v. Earl of *Powys*, Amb. 231. (*x*)

(*x*) A devise of real estate for payment of debts, does not let in a debt upon which the statute had operated before the testator's death. *Burke* v. *Jones*, 2 V. and B. 275. *Executors of Fergus* v. *Gore*, 1 Sch. and Lef. 107. *Ex parte Dewdney*, and *Ex parte Seaman*, 15 Ves. 497.

(*y*) The motion to put a plaintiff to his election, is one of course. *Anon.* 1 Ves. J. 91.; and upon plaintiff's moving to discharge that order, a reference is made to the master to inquire whether the suits are for the same matter. *Bullen* v. *Butcher*, 2 Dick. 558. *Boyd* v. *Heinzelman*, 1 V. and B. 381. *Mouseley* v. *Basnet*, in note to *Boyd* v. *Heinzelman*: but where it is not denied that the suits are for the same matter, *Young* v. *Lucas*, 1 V. and B. 383. note (*a*). *Hogue* v. *Curtis*, 1 J. and W. 449; or where there is no difficulty in deciding that question if disputed, the court will decide without the reference. *Mills* v. *Fry*, 19 Ves. 277. Coop. 107. 3 V. and B. 9. The order to elect stays all proceedings at law and in equity, unless the court makes a special order to the contrary. *Barker* v. *Dumaresque*, 2 Atk. 119. *Hogue* v. *Curtis*, ub. sup. *Carwick* v. *Young*, 2 Swan. 239. Election will be ordered between proceedings here and in a foreign court. *Pieters* v. *Thompson*, Coop. 294.

(*z*) And it is irregular to obtain the order to elect, until the time for filing exceptions has expired. *Browne* v. *Poyntz*, 3 Mad. 24.; and see *Coupland* v. *Bradock*, 5 Mad. 14.; and a plea is not an answer for the purpose of putting a plaintiff to election. *Fisher* v. *Mee*, 3 Mer. 45. *Vaughan* v. *Welsh*, Mos. 210. *Anon.* Mos. 304.

DE

TERM. S. HILARII, 1730.

Case 20.

HARRIS *v.* INGLEDEW.

Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 74. pl. 26. 233. pl. 17. 255. pl. 3. 462. pl. 15. 768. pl. 6.

A will begins, as to all my worldly estate, my debts being first paid, I give, &c.; the real estate is liable to the debts, nothing being devised till the debts are paid.

THIS bill was brought by the simple contract creditors of *William Ingledew*, to compel a sale of the real estate of the said *William Ingledew*, for payment of his debts, he having made a will to this effect: "As to all my worldly estate, "*my* "*debts being first satisfied*, I devise the same as follows." Then he proceeded to devise part of his estate, being freehold, to his brother in fee, to whom also he bequeathed a term for years. Other part being copyhold, he devised to *A.* in fee, other part of his freehold to *B.*, and the remaining part to *C.* in fee; after which he died without issue, leaving his brother *John Ingledew* his heir, who having, on the testator's death, entered on the freehold lands devised to him, and also on the copyhold premises, as not having been surrendered to the use of the will, made his will, whereby he devised all his estate real and personal to his wife, and died leaving a son.

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The widow of *John Ingledew* the brother, and her son, being the nephew and heir of the first testator, joined in a sale of several of these lands to several persons, for valuable considerations; and the simple contract creditors now bringing their bill against the several devisees of the premises, and also against the purchasers, in order that the several lands might be sold for the satisfaction of their demands, the will was proved, but *John Ingledew*, the nephew and heir of the first testator, was not made a defendant to the bill.

In a devise of lands to pay debts, if the creditors bring a bill to compel a sale, the heir is generally to be made a party.

Upon which it was insisted, that the heir at law ought to be a party, it being ever done in like cases; that the bill being for a sale, if the heir was before the court, the evidence to the will would be perpetuated; but in case he should not be a party, a decree for sale of the estate would be vain; for

Secus, in case of a trust created by deed to pay debts.

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no one would buy, at least he would not give half the value for it: whereas, should the heir be a defendant, this will charging the lands with payment of the debts, the heir would be decreed to join; that the general practice in cases where a will of land is proved, is, to declare the will well proved; that is, well proved against the heir; for it cannot be said to be proved against any one else. And suppose these lands should be sold by the devisees, pursuant to the decree, and afterwards the heir should sue for the estate, and recover; here would be a purchaser under a decree, evicted notwithstanding, for want of the plaintiff's having made the heir a party: and yet the court ought not to suffer any thing to happen to the prejudice of those, who are to be purchasers under its decrees.

To which it was answered, that the descent was broke by the devise, and the estate being devised away from the heir at law, he was no more interested therein than any stranger; that in case lands are by a *deed* conveyed to trustees to sell, and afterwards the grantor dies, unless the heir is to have the surplus, he need not be a party to the bill for compelling a sale.

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Master of the Rolls. This seems a material objection; for since the sale of the estate must affect all the devisees in proportion, and as the estate would not, without the heir being a party to the decree, sell for near the value, this might be a wrong to all the devisees, and occasion more of their lands to be sold than would perhaps be otherwise necessary. With regard to what has been urged, that where lands are conveyed by *deed* to trustees to sell, the heir, unless entitled to the surplus, need not be a party to a bill that prays a sale; it must be observed, that the proof of a *will* is attended with more solemnity than that of a *deed;* the former being supposed to be made when the testator is *in extremis*, and therefore in equity it is necessary to prove the sanity, which is all presumed in the case of the latter: also a deed may be proved *vivâ voce* at the hearing; but no such order can be made for proving a will (*x*); the reason is, because here more is to be proved than barely the execution; for instance, you must prove, that there were three witnesses, and that these subscribed their names in the presence of the testator;

Where a bill is brought to prove a will of land, the sanity of the testator must be proved; secus, in the case of a deed of trust to sell for payment of debts.

The court never orders a will to be proved viva voce at the hearing, as they do a deed.

(*x*) *Eade* v. *Lingood*, 1 Atk. 203. *Lake* v. *Skinner*, 1 Jac. & W. 15. *Turner* v. *Burleigh*, 17 Ves. 354.

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which holds still stronger in the present case, where two wills are to be proved; namely, the will of the first testator *William Ingledew*, and afterwards that of *John Ingledew*.

But after all, considering that *William Ingledew*, the first testator, had been dead ever since *December*, 1719, and that the freehold lands had been quietly enjoyed under the will, his Honour did decree a sale without the heir being a party (*y*); but said, he would stop passing the decree, in case the defendant's counsel should be able to shew where, in the like instance, the court ever refused to make a decree, without making the heir a party.

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Secondly, In this case, one of the defendants having purchased a term for years, and also part of the freehold estate that had belonged to the testator *William Ingledew*, he pleaded, that he was a purchaser for a full and valuable consideration, (shewing the sum, and that it was to the full value of the estates) but omitted in his plea to deny notice (*z*) of the will of *William Ingledew*.

A defendant in his plea of a purchase for a valuable consideration, omits to deny notice; if the plaintiff replies to it, all the defendant has to do, is to prove his purchase; and it is not material, if the plaintiff proves notice; for it was the plaintiff's own fault that he did not set down the plea to be argued, in which case it would have been overruled.

And for the plea it was argued, that the plaintiff having replied to the plea, he had admitted it to be good; but joined issue thereon, insisting it was not true in fact; indeed, had he set it down to be argued, it would then have been a good exception thereto, that the defendant had not denied notice: but since the plaintiff had not thought fit so to do, but had replied to the plea, all that was incumbent on the defendant was, to prove what he had pleaded; which if he should be able to do, the bill, as against him, must be dismissed with costs. Besides, otherwise the defendant might be tricked by the plaintiff, who having found, that the defendant had made a slip in his plea, might decline arguing it, and reply to it. In which case the defendant would be without remedy; for he could do no more than prove his plea; whereas, if such plea had been set down to be argued, on its being overruled, the defendant might still have helped himself, by putting all his defence in his answer.

On the contrary it was said, that when every one sees here is a lease for years, which of course is liable to pay debts by simple contract, and to which a purchaser cannot possibly have any title but by the will, it was to be presumed the court would hardly shut their eyes, but permit the honest

(*y*) *Anon.* 1 Ves. Jun. 29. *Graham* v. *Graham*, 1 Ves. Jun. 276.

(*z*) See post, 244, n. (F).

creditors to follow the assets wherever they can find them. Also this would be a prejudice to the devisees of the real estate, should the term not be applied to the payment of debts, because more of the lands devised must be sold than otherwise need be.

Master of the Rolls. The constant course is, in case a plea be replied to, that the defendant need only prove his plea: and here it is the plaintiff's own fault, for he had it in his election to have set it down to be argued. Wherefore, if the defendant proves what he has pleaded, the bill is to be dismissed, as against him, with costs. But with regard to the objection, that the devisees of the land will suffer by this, in that more of their lands must now be sold, this will not prevent the devisees, or any of them, from bringing their bill to compel an application of this lease, in the first place, to the payment of their debts, as being part of the personal estate.

Thirdly, It was contended, that the real estate of the testator, *William Ingledew*, was not by his will charged with the payment of debts; for though it was said, that as to the testator's worldly estate, *his debts being first satisfied*, he devised the same, &c. though the testator did say his debts should be first satisfied, yet he did not say his debts should be charged on his land, or real estate.

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But the Master of the Rolls thought it to be very clear, that in this case no land, nor any part of the testator's worldly estate, was devised until after his debts paid, consequently that the land was charged; for which he cited 1 *Vern.* 45. *Newman* v. *Johnson*, 2 *Vern.* 708. *Trott* v. *Vernon;* and he thought it would have been sufficient, though the word *first* had been omitted. (1)

(1) See also *Bowdler* v. *Smith*, Pre. Cha. 264. *Beachcroft* v. *Beachcroft*, 2 Vern. 690. *Davis* v. *Gardiner*, ante, 2 vol. 190. *Legh* v. *Earl of Warrington*, 4 Bro. P. C. 90. *King* v. *King*, post, 359. *Hatton* v. *Nicholl*, Ca. temp. Tal. 110. *Earl of Godolphin* v. *Penneck*, 2 Vez. 271. *Thomas* v. *Britnell*, 2 Vez. 313.(z)

(z) *Kightley* v. *Kightley*, 2 Ves. Jun. 328. *Williams* v. *Chitty*, 3 Ves. 545. *King* v. *Denison*, 1 V. & B. 274. *Noel* v. *Weston*, 2 V. & B. 269. *Clifford* v. *Lewis*, 6 Mad. 33. But if the direction for payment of debts is confined to payment by executors, not being also devisees, it creates no charge on the real estate. *Brydges* v. *Landen*, cited in *Williams* v. *Chitty*, ub. sup. *Keeling* v. *Brown*, 5 Ves. 359. *Powell* v. *Robins*, 7 Ves. 209. *Sanderson* v. *Wharton*, 8 Price 680.

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One by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by the will; the copyhold, though not surrendered to the use of the will, shall yet be applied to the payment of the debts pari passu with the freehold.

Fourthly, It was argued that admitting the freehold of the testator to be charged with payment of debts, yet the copyhold which was not surrendered to the use of the will, was not charged, that not being in law devisable; and though it had been surrendered to the use of the will, yet even in such case it would have passed by the surrender, not by the will; for which reason a copyhold will pass, though by a will that has not three witnesses to it. So if I were to devise all my real estate, though a copyhold may, in some sense, be deemed a real estate, as it descends to the heir, and does not go to executors, yet the copyhold would not pass in that case, because the intent of such will must be to devise an estate, that is in its nature devisable.

However, the Master of the Rolls was of opinion, that in the principal case the copyhold, as well as freehold, was well charged with the debts; since all the copyhold of the testator was by express words devised either to the heirs, or to those that were not his heirs. So that it appears the testator took the copyhold to be part of his wordly estate, all which is by the will charged with the payment of his debts.

[97] And it had been sufficient, if the testator had only said, "I "charge my copyhold land with the payment of my debts;" in which case equity would have supplied the want of a surrender. [A]

Fifthly, But then it was insisted for the defendant, that granting the copyhold lands were made liable by the will to the payment of debts, yet that ought not to be, till all the freehold lands had been first applied; for they ought not to come in *pari passu* with the freehold lands, because these are devisable at law, which the others are not; and equity must first intervene, and supply the want of a surrender, before copyhold lands can be liable, whereas a freehold is devisable and chargeable by the testator by the will only.

To which it was answered, that as this will was penned, the freehold was not devised, but only charged with the debts, which amounted to no more than an equitable charge, as to

[A] This the reporter admits to be so: but observes, if it were but an equitable charge, and the legal estate of the copyhold had descended to the heir, that would have made it necessary that the heir should be a party, because otherwise the legal estate of the copyhold could not be conveyed to a purchaser. But if it had appeared, (which he thinks did not) that the heir at law had since the testator's death conveyed away all the copyhold estate, then indeed, the grantee of the heir being capable of conveying to the purchaser, it might not be necessary to make the heir a party.

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the freehold as well as copyhold; and the copyhold being mentioned in the will, it was the intention of the testator, that they should be charged equally and in proportion.

Though for the defendant it was replied, that let a copyhold be never so expressly devised, yet, unless it be for payment of debts, a charity, or by way of provision for a wife,(1) [98] or children, (which cases did not any way concern the present) equity will not supply the want of a surrender. That this is never done in favour of a devisee; consequently, there could be no reason to expect it in favour of the devisees of the freehold estates in the principal case, since it did not as yet appear, but that these estates, if all sold, would be sufficient to discharge the debts; and therefore the copyhold ought not to be charged *pari passu*. *Quod nota.*

Notwithstanding which, his Honor inclined, that the copyhold should be charged (2) with the debts *pari passu* with the freehold, by reason the former were as expressly devised by the will as the latter, and all the testator's worldly estate was subjected to the payment of his debts. But since it did not as yet appear, that the personal estate would not be sufficient to pay the debts, this point, whether the copyhold should contribute *pari passu, &c.* was reserved till after the account taken. But,

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(1) Vide *Watts* v. *Bullas*, ante, 1 vol. 60.

(2) But this part of the case of *Harris* v. *Ingledew* is not now received as the law of the Courts of Equity, which supply the want of a surrender of a copyhold estate in favour of creditors, *so far only* as may appear *necessary* for the payment of the debts; and, consequently, while any freehold estate remains applicable to that purpose, the want of the surrender of the copyhold shall not be supplied, notwithstanding the express intention of the testator to charge the copyhold rateably with, or in preference to, the freehold. *Drake* v. *Robinson*, ante, 1 vol. 443. *Haslewood* v. *Pope*, post, 322. *Mallabar* v. *Mallabar*, Ca. temp. Tal. 78. *Coombes* v. *Gibson*, 1 Bro. C. C. 273. *Hellier* v. *Tarrant*, Ca. temp. Tal. 3d edit. 288. (note). (*x*) But this is to be understood of the *legal* estate only, for an *equitable* estate of copyhold will pass by such devise *without surrender*. *Car* v. *Ellison*, 3 Atk. 73. *Tuffnell* v. *Page*, Barnard. 9. *Allen* v. *Poulton*, 1 Vez. 121. *Macnamara* v. *Jones*, 1 Bro. C. C. 481.(*y*)

(*x*) *Lindopp* v. *Eborall*, 3 Bro. C. C. 188. *Growcock* v. *Smith*, 2 Cox 397. *Milbourne* v. *Milbourne*, 1 Cox 247. *Judd* v. *Pratt*, 13 Ves. 168. 15 Ves. 394. *Kidney* v. *Coussmaker*, 12 Ves. 136.

(*y*) But now by stat. 55 Geo. 3. c. 192. copyhold estates will pass by devise or appointment without a surrender to the use of the will, in all cases where they would have passed by devise or appointment with such surrender.

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If I charge all my lands with payment of my debts, and devise part to A. and other part to B. &c. the creditors cannot be paid out of the lands till the Master has certified what the proportion is, which each devisee is to contribute: but if the Master certifies, that the debts will exhaust the whole real estate, then the creditors may proceed against any one devisee for the whole.

[*99]

Sixthly, Hereupon, on behalf of the creditors, it was represented to be hard, that these should be obliged to wait until the account was taken, and until the Master should have certified how much would be the proportion that each devisee or each purchaser was to contribute towards their satisfaction. For that the creditors ought to be at liberty to come upon any part of the freehold estate; after which the several devisees or purchasers might apportion the charge amongst themselves; and as to the freehold that had been sold, the creditors were willing to take the money from the heir or devisees, who had sold, and so give the purchasers no trouble.

**Cur'*: That will indeed make the matter more easy: but yet till the account shall have been taken, and it be known what the proportion is that each devisee is to pay, the creditors must wait notwithstanding; for they must not be left at liberty to take the whole from some of the devisees, and but part from others; which would be oppressive. And if the whole estate of any of the devisees be not liable, then the whole purchase money, for which any part of the premisses was sold, will not be liable. But if it shall be reported by the Master, that the whole of the freehold lands will be insufficient for payment of the debts, then the creditors may proceed against any one devisee for the whole, in case I should be of opinion, that the copyhold ought not to be charged *pari passu*: but if I shall continue to think as I do at present, in such case, the creditors must wait until the proportion is settled, what the owner of each is to contribute, as well with regard to the copyhold as the freehold.[B]

[B] In this case the Master of the Rolls did not alter his opinion, it appearing by the Register's book, that the will of the testator *William Ingledew* was declared to be well proved, and that the freehold and copyhold estates particularly devised by his will were liable to the payment of his debts *pari passu*. *March* 10, 1730.(1)

(1) Reg. Lib. A. 1730. fol. 246.—In the argument of *Hellier* v. *Tarrant*, ub. sup. the case of *Harris* v. *Ingledew* was treated as a case, in which the heir at law was bound to make good the surrender of the copyhold by his election to take under the will (according to the principle of *Noys* v. *Mordaunt*, 2 Vern. 581. *Streatfield* v. *Streatfield*, Ca. temp. Talb. 176, &c.) but it does not appear by the pleadings, or by the words of the decree, that the case was put upon that ground.

12. Ap. Ca. 682.

WITTER *v.* WITTER.

Case 21.

Hilary Vacation, 1730.

Lord Chancellor KING.

ROBERT WITTER, possessed of a term for ninety-nine years, of lands in the county of *Chester*, if three lives, or any of them should so long live, held *of the late Earl *Rivers*, made *A.* his executor, and by his will devised the term to his infant nephew, *John Witter*, and died, his own life being one of the three lives. The executor applied to the Earl *Rivers* to renew, by adding a third life; and there was some slight proof that the Earl had refused to make any more leases for years of his tenements in lease, but had changed them to lives, in order to make votes in choosing members of parliament, when he was in the administration. So that in the present case the executor of *Robert Witter* the lessee took a new lease, in the name of a trustee, to him and his heirs for three lives, (*viz.*) that of the infant, and the two old lives; and this was in trust for the infant and his heirs.

An executor in trust for an infant of a lease for 99 years, determinable on three lives, on the lord's refusing to renew but for lives absolutely, complies with the lord, and changes the years into lives; on the infant's dying under 21, and intestate; this shall be a trust for his administrator, and not for his heir.

[*100]

The infant died above the age of fourteen and under twenty-one, unmarried and intestate: whereupon the question was, who should be entitled to this lease, his heir or administrator?

It was insisted, that the administrator of the infant was entitled; and that it should not be in the breast of any executor or trustee to alter the nature of the trust estate, any more than it was in the election of a [C] guardian to change the personal estate by investing it in lands: since this would be to give an absolute power of disposing of and altering the right and property of the lease to one who was but a bare trustee; that if the court had been applied to for leave to do this, they would never have granted it without a provision, that in case the infant should die during his infancy, the purchase should not turn to the prejudice of the representatives of his personal estate: also, that this would be injurious to the infant himself, who, if it had continued, as originally it

Trustee cannot change the nature of the estate by turning money into land, or a lease for years into a freehold, and e converso.

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[C] See for this purpose the case of *Terry* v. *Terry* and *Ragget*, Pre. in Chan. 273.

WITTER v. WITTER.

was, a lease for years, might have devised it at fourteen [D]; whereas being turned into a freehold descendible, it could not be devised by him until his age of twenty-one.

On the other side it was represented as likely to prove very detrimental to an infant, if, in a case where the lord would not renew but for lives, the executor should not be enabled to comply with this; because the other two lives might drop during the infant's life; and the case would be the same if there were but one life in being; and then the infant, instead of being deprived of the power of devising (as had been objected) might have no estate to devise; that the putting the infant's life into the lease must be for the benefit of the infant, and of him only; and as to what had been mentioned of turning an infant's personal into a real estate, that seemed to be a thing not necessary, but the renewal of the lease was a matter of absolute necessity.

A lease renewed by a guardian for an infant's benefit shall follow the nature of the original lease.

Lord Chancellor. This renewed lease, though for lives, shall follow the nature of the original one, and go to the executors or administrators of the infant, as that should have done. If the fact had been (which has not been fully proved) that the Lord *Rivers* would not have made any other than a descendible lease for three lives, this might and ought (1) to have been declared in trust for the benefit of the executors and administrators of the infant, if he should die during his infancy. Now, though this trust be not declared, yet it

[D] In the case of the Earl of *Winchelsea* v. *Norcliffe*, 1 Vern. 402. 435. this observation appears to have been first made by serjeant (afterwards lord commissioner) *Rawlinson*, and to have great stress laid upon it by the Lord Chancellor *Jefferys*.

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(1) Vide *Mason* v. *Day*, Pre. Cha. 319. *Pierson* v. *Shore*, 1 Atk. 480. and in general a guardian or trustee shall not alter the nature of the infant's property, so as to change the right of succession to it in case of the infant's death, unless by some act manifestly for the advantage of the infant at the time. *Rook* v. *Warth*, 1 Vez. 461. *Tullit* v. *Tullit*, Amb. 370. *Inwood* v. *Twyne*, Amb. 417.(*x*) *Vernon* v. *Vernon*, cited in *Ex parte Bromfield*, 3 Bro. C. C. 513.(*y*)

(*x*) S. C. 2 Eden 148.

(*y*) S. C. 1 Ves. Jun. 453. *Oxenden* v. *Compton*, 4 Bro. C. C. 234. 2 Ves. Jun. 69. Nor so as to affect the power of the infant over his property even during his infancy. *Ware* v. *Polhill*, 11 Ves. 257. *Ex parte Phillips*, 19 Ves. 118. See also *Ashburton* v. *Ashburton*, 6 Ves. 6. *Webb* v. *Shaftesbury*, 6 Mad. 100. *Langley* v. *Sneyd*, 1 Sim. & St. 45.

WITTER v. WITTER.

An estate pur autre vie is distributable in equity, though not in the spiritual court.

is in equity implied, since the renewed lease, though for lives, comes in the place and stead of the original lease which was for years. In consequence of which his Lordship declared, that the same should be liable to a distribution according to the statute, saying, that though the spiritual court cannot intermeddle with a freehold to distribute [E] it, yet it doth not follow but that this court may enforce such a distribution. (2)

[E] See Salk. 464. *Oldham* v. *Pickering*, and the note at the end of the case of *Duke of Devon* v. *Atkins*, vol. 2. 382.; but more particularly the statute of 14 Geo. 2. whereby an estate *pur autre vie* being undevised, or in part applied to the payment of debts according to the statute of frauds, shall be distributed in the same manner as personal estate.

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(2) Reg. Lib. B. 1730. fol. 213. by the name of *Witter* v. *Coup*.

DE

TERM. PASCHÆ, 1731.

Case 22.

EX PARTE SIR RICHARD GROSVENOR.

Lord Chancellor KING.

Supplicavit. One taken on a supplicavit, and continued in prison a year without any fresh threatening, ought to be discharged.

SIR RICHARD GROSVENOR, upon filing articles in Chancery, obtained a *supplicavit* against Mrs. ———, who being taken upon the writ, was carried to *Newgate*, where she had continued near thirteen months. And now it was moved that she might be discharged, insisting, that it was the course of the King's Bench, if a *supplicavit* be granted against any one, and the party taken upon it continues in prison for a year and a day, without any fresh threatening or misbehaviour having been offered by or on behalf of the party against whom the *supplicavit* was granted; that he ought to be discharged, and that it was so in the case of commitments for any breach of the peace.

Lord Chancellor. Nothing can be more oppressive than an indefinite imprisonment; and it seems a reasonable practice in the King's Bench, if nothing has been offered either by threatening or other misbehaviour, within a year and a day after the taking up of the party, by him or on his behalf, that he ought to be discharged. Accordingly the court was inclined to have granted the motion in the principal case: but the notice of motion being given by *A. B.* the solicitor for the woman that was committed, and he not being a solicitor admitted in chancery, the court would not look upon this as notice; and the party undertaking to give another notice against the first day of the term, the motion was put off till then, at which time the said Mrs. ——— moved it again, and it was ordered that she should be discharged upon entering into a recognizance before a Master in 100*l.* with two sureties in 50*l.* each, to keep the peace; and the Master was directed to be easy and not strict as to the abilities of the

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Notice of motion given by one not allowed to act as a solicitor, not good.

sureties, the court having regard to her long imprisonment. (1)

Sir Richard Grosvenor Ex parte.

(1) Vide *Baynum* v. *Baynum*, Amb. 63. *Ex parte King*, Amb. 240, 333.(*x*)

(*x*) And see *Clavering's case*, ante, 2 vol. 202.

FRANCIS SHELDON, ESQ. *v.* MR. JUSTICE FORTESCUE ALAND ET AL'.

Case 23.

Lord Chancellor King.

2 Eq. Ca. Ab. 74. pl. 27. 281. pl. 3. The court allowed the profits of the lunatic's estate to the committee for the maintenance of his person. The lunatic dies, his administrator brings a bill for an account of these profits; the defendant the committee pleads this order of court of the allowance of the profits for the lunatic's maintenance; the plea ordered to stand for an answer: but the court declared they would not relieve in such case without gross fraud.

A BILL was brought by the administrator of Sir *William Dormer*, Bart. a lunatic, against the administrator of Mr. Justice *Dormer*, to have an account of the personal estate, and of the rents and profits of the real estate of the lunatic, received in his life-time by Mr. Justice *Dormer*, who was the committee of the lunatic's estate; shewing, that Sir *William Dormer* was seised in fee of divers manors and lands in the counties of *Bucks* and *Gloucester*, of 500*l.* *per annum*, and possessed of a considerable personal estate, and in 1692, became, and was by inquisition found, a lunatic; and that the custody of his estate was granted to Mr. Justice *Dormer*, and that of his person * to Sir *Robert Jenkinson*. The bill was also to be relieved against, and to set aside, several orders of the Court of Chancery, whereby it was ordered, that Mr. Justice *Dormer* should be allowed the rents and profits of the lunatic's estate for the maintenance of the lunatic's person, and the care and management of his estate. To which purpose the bill set forth, that after the inquisition found, to the end the court might judge what was a proper allowance for the maintenance of the lunatic, it was directed, that the Master should look into the value of the estate and the incumbrances thereon: that, pursuant to such order, the Master made a report of the yearly value of the estate, and the charge of the physicians attending the lunatic, and the disbursements of Mr Justice *Dormer* relating to the estate; and this account was signed by Mr. *Sheldon*, who married the sister and next presumptive heir of the lunatic; that thereupon the Lord *Sommers*, by order of the 16th of *June*, 1699, with the consent of the said Mr. *Sheldon*, ordered,

[*105]

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that the profits of the lunatic's estate should be allowed to Mr. Justice *Dormer*, for the maintenance of the lunatic, and the care and management of his estate, deducting only 200*l.* *per annum* thereout for the paying off incumbrances upon the estate, and which in fact have since been paid off; that the last order had been continued or revived upon every demise of the crown, and by the succeeding Lord Chancellor or Lord Keeper of the Great Seal for the time being. And the bill further shewed, that Mr. Justice *Dormer*, and the lunatic's sister *Susannah*, the wife of *Sheldon*, seven days before the making of the above-mentioned order by the Lord *Sommers*, *(viz.)* on the 9th day of *June*, 1699, did enter into articles, whereby *Sheldon* covenanted for himself, his wife, and his children born, or to be born, that they would be aiding to the Judge, who should have the *Buckinghamshire* estate allowed to him for the maintenance of the lunatic, and be permitted to take up his bond, which he had given to account. And Mr. Justice *Dormer* covenanted, that he would be aiding and assisting to *Sheldon* and his wife, who were to have the *Gloucestershire* estate of the lunatic without account, save only that out of the profits thereof a debt of 550*l.* on the *Gloucestershire* estate should be paid off.

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The defendant, Mr. Justice *Fortescue*, and his Lady pleaded, that King *William* and Queen *Mary*, by virtue of their undoubted prerogative, by their royal sign manual directed to Sir *John Sommers*, Knight, then Lord Keeper of the great seal of *England*, reciting, that the care of idiots and lunatics doth of right belong to the Crown, did grant to the said Sir *John Sommers* full power and authority, without any further warrant, to give order and direction for preparing of grants for the custody or commitment of the estates or persons of lunatics or idiots, according to the rules of law, and the use and practice in like cases, as he should judge meet. They then pleaded, that Sir *William Dormer* was by inquisition found a lunatic, and the inquisition returned into the petty bag; and they pleaded the several orders under the several Lord Chancellors and Lord Keepers for the time being, upon every demise of the Crown, whereby the custody of the estate of the lunatic was committed to Mr. Justice *Dormer*; and the orders whereby the Master was to take an account of the estate of the lunatic and of its incumbrances, and the Master's report thereupon; and in particular, the order of the 16th of *June*, 1699, made by the Lord *Sommers* by the

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consent of Mr. *Sheldon*, that 200*l. per annum* out of the estate should be applied towards the payment of the incumbrances affecting the lunatic's estate, the residue to be allowed towards the maintenance of the lunatic and the management of his estate; and likewise the several orders made by the great seal, upon every demise of the Crown, for reviving of the said order of the 16th of *June*, 1699, and the grants made under the royal sign manual, upon every demise of the Crown, to the then Lord Chancellor or Lord Keeper, authorising them respectively to make grants and orders for the custody of the persons and estates of lunatics, and to act therein as they should think fit. All which grants under the royal sign manual, together with the report, and the said successive orders, the defendants pleaded in bar of such part of the bill, as sought to compel the defendants to account for the rents and profits of the lunatic's estate, or to discharge the said orders.

For the plea it was insisted, that this was a peculiar jurisdiction of the great seal, granted under the royal sign manual, and in virtue of the prerogative of the Crown; that these orders were made by the Lord Chancellors or Lord Keepers for the time being, not as Chancellors or Keepers, but by authority of the sign manual, and under this particular power and jurisdiction, and so not impeachable by bill to the Lord Chancellor as Lord Chancellor; besides, that were it in the case of any order made by the Lord Chancellor as Lord Chancellor, nothing could be more incongruous, than to bring an original bill to set aside an order made by the court; that the present bill was the less to be countenanced, in that there had been so many orders made by every succeeding Lord Chancellor or Lord Keeper, upon every demise of the Crown; so that this order of the 16th of *June*, 1699, had obtained the sanction of many eminent and learned men, who had been successively in that great office; that in the case of orders made in relation to lunatics, the Lords themselves will not hear any appeal, but the same must be made to the King in council; of which there was a recent [A] in-

No appeal lies from an order of the Lord Chancellor, touching lunatics, to the House of Lords, but only to the King in council. See the note at the bottom.

[A] The following extract has been taken from the Lords' journals, "*Die* "*Martis*, 14 *Feb.* 1726. The house (according to order) proceeded to take "into consideration the petition and appeal of *William Pitt*, esq. and *Samuel* "*Pitt*, merchant, complaining of two orders made by the Lord Chancellor, the

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stance; that where the commitment of a lunatic is granted, the court does not so much regard the benefit of his administrator, as the well-being and comfort of the lunatic himself, so far as his estate will allow, with a view that such lunatic may live as easily as his unfortunate condition will admit of, agreeably to his circumstances.

In answer to which it was alleged, that the bill was brought to set aside these orders, for the fraud and collusion by which they had been obtained; that this fraud and collusion sufficiently appeared by the articles entered into by
[109] Mr. Justice *Dormer*, and Mr. *Sheldon*, but seven days before obtaining the order; which articles were concealed from the court, and appeared plainly to have been for sharing and dividing the lunatic's estate; and that it was a most extraordinary thing to give up Mr. Justice *Dormer's* bond for accounting: that not only an interlocutory order, but a decree itself, if gained by (1) collusion might be, and frequently had been, set aside even on a petition, by the same reason that judgments in courts of law when obtained unduly, and by collusion, were every day set aside on motion; that the collusion of granting (in the present case) the custody of the

" 23d of *December* and 25th of *January* last, granting the custody of the person " of *Samuel Pitt*, a lunatic, the appellant's uncle, as in the appeal is mentioned; " and praying, that the said orders may be reversed. And the said appeal " being read by the clerk, notice was taken to the house, that the custody of " idiots and lunatics was in the power of the king, who might delegate the same to " such person as he should think fit. Whereupon the Lord Chancellor produced " a paper writing under his majesty's royal sign manual, intrusting his lordship " with the care and commitment of the custody of idiots and lunatics, and of " their persons and estates; and the same being read by the clerk, it was " moved, that the before-mentioned appeal of the said *William Pitt*, and *Samuel* " *Pitt* might be received; and after long debate, and reading the statute of the " 17th of king *Edward* the Second, *De prerogativâ regis* of idiots, *cap.* 9 and " 10, the question being put, whether this appeal shall be received? It was " resolved in the negative."

Ashley Cowper, Cler' Parliamentor'.

In consequence of the above resolution, an appeal was brought before the king in council, where, after some debate touching the jurisdiction, the matter of the appeal was heard and determined, *May* 15, 1728. (2)

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(1) Vide *Richmond* v. *Tayleur*, ante, 1 vol. 737. *Lloyd* v. *Mansell*, ante, 2 vol. 73.

(2) So, *Rochfort* v. *Earl of Ely*, 6 Bro. P. C. 329. (*x*)

(*x*) *Oxenden* v. *Lord Compton*, 2 Ves. Jun. 72.

person of the lunatic to Sir *Robert Jenkinson* was undeniably evident, it being at the same time well known (*a*), and what must be admitted, that the lunatic was in fact never in the custody of any other person than of Mr. Justice *Dormer*; that a bill for an account as well lay against the committee of an estate of a lunatic as against the assignees of the estate of a bankrupt; that the present bill was the more proper, because, till the death of the lunatic, no person had a right to any part of the lunatic's estate, nor was consequently entitled to bring such bill; that the subsequent orders made for committing the lunatic's estate to Mr. Justice *Dormer*, subject to account, and his giving security accordingly, were a tacit waiver of any former order by which he might apprehend himself to be a committee without account; nay, that a grant by the great seal of the custody of the estate of a lunatic [not an idiot] without account, would be void in itself: so if such grant were made to the use of the grantee, *quamdiu* the lunatic should continue a lunatic, this were void; *Moor* 4. *Frances's* case, and *Hob.* 215; for it is contrary to the trust which the law reposes in the Crown; and in all such cases the King is taken to be deceived in his grant; that in the [110] case of a lunatic, *(qui gaudet lucidis intervallis)* the law does not despair, but takes notice of a possibility at least, if not a probability, of his recovery; and therefore provides that against such time of his recovery, whenever it shall fall out, an account shall be rendered to him, and restitution made of his estate: else the law itself would be almost barbarous, and add affliction to affliction; that suppose the lunatic himself had recovered, and brought a bill for an account, he must have had it; and surely his administrator has the very same right.

(*a*) Vol. 2. 264.

Lord Chancellor. I do not see any fraud in Mr. Justice *Dormer's* having obtained this order of the 16th of *June*, 1699, or that the court was surprised in it: there appears to have been an order of court to refer it to the Master to see, what was the lunatic's estate, and how incumbered; pursuant to which a report was made: neither have I been able to discover any fraud in Mr. Justice *Dormer's* having got up his bond. Then supposing this to be so, where such order has been made for the allowance of the profits of the estate of the lunatic towards his maintenance, and this so often renewed by the Lord Chancellor and Lord Keeper for the time being; by which it is reasonable to suppose the committee to have been induced to take the less care of the accounts;

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it would be extremely hard, unless some great fraud were made to appear, to oblige such committee, and much more his executors or administrators, to account or refund. I admit the King or the great seal cannot grant a lunatic's estate without account: but as the Lord Chancellor may make what allowance he pleases for the maintenance of the lunatic; so, supposing the estate to be *500*l. per annum*, or 1000*l.* (and in the case of a baronet, as the present case is,) the court may allow as great a salary as the income of the estate amounts to; in some cases, where the income is very narrow, the whole may be little enough.

The King's grant of a lunatic's estate without account is void; but the king or lord chancellor may allow such a yearly maintenance to a lunatic as amounts to the yearly value of the lunatic's estate.

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Now this being a difference in form only, that the allowance of the whole profits (in express terms) is not good, but the allowance of such a yearly salary as amounts to the whole yearly profits, is good; it is not reasonable such a mistake in form should subject the committee or his representative to account for or refund what has been received under the commitment. Mr. Justice *Dormer* does not seem to have waived the benefit of these orders for his allowance on account of maintenance, by having accepted the subsequent orders for the commitment of the lunatic's estate, on his submitting to give security to account, or by having actually entered into such security; because this is necessarily incident to such committeeships. I admit even a decree, much more an interlocutory order, if gained by collusion, may be set aside on a petition; *à fortiori*, may the same be set aside by bill. The principal case seems to be very hard on the defendant's side: but let the plea stand for an answer without liberty to except. [B] (*z*)

A decree gained by fraud may be set aside by petition, as well as a judgment at law by motion; a fortiori, may such decree be set aside by bill.

[B] It appears from the Register's book, that on motion it was alleged, that the matters in difference were compromised; it was therefore prayed, that the plaintiff's bill might stand dismissed without costs, which, on hearing counsel for the defendant, who consented thereto, was ordered accordingly, *Feb.* 27, 1732.

The custody of a lunatic may be granted to a feme covert, though she be not *sui juris*, but under the power of her husband. By the Lord *Parker*, *Ex parte Kingsmill*, *Michaelmas*, 1720.

One through a great age being deprived of his memory, and become almost *non compos mentis*, was admitted to answer by his guardian (*y*), in regard the demand in question was but small: but had the value been considerable, the regular way had been to have taken out a commission of lunacy, and have gotten a committee assigned. By the Lord *Talbot*, *Michaelmas*, 1733. *Anonymus*.

(*y*) See *Mitford*, 82. in 3d Edition. 14 Ves. 172. *Levinz* v. *Caverly*, Prec. in Cha. 229. 1 Eq. Ca. Ab. 281.

(*z*) See more of this case, *ante*, 2 vol. 262. *Wilson* v. *Grace*,

7. Lim. 676.

WOOLCOMB *v.* WOOLCOMB. Case 24.

Lord Chancellor KING.

2 Eq. Ca. Ab. 326. pl. 36. Devise of all my household goods, and other goods, plate, &c. to A. the residue of my personal estate to B.; the ready money and bonds do not pass by the word "goods," for then the bequest of the residue would be void.

ONE devised to his wife all his household goods and other goods, plate and stock within doors and without, and bequeathed the residue of his personal estate to *J. S.* The question was, whether the testator's ready money, cash, and bonds, should pass to the wife by these words?

It was contended, that the devise of all the testator's goods should carry all his personal estate, *omnia bona* being words of the largest extent and signification, with regard to personals.

To which it was answered, that if the devise of all the testator's goods were to be taken in so large a sense, it would then frustrate and make void the bequest of the residuum, which would not be allowed; that it seemed reasonable the words *other goods* should be understood to signify things of the like nature with household goods, to the end the whole will might have its effect; and consequently, that the testator's ready money, cash, and bonds, should not in this case, pass by the word *goods*, but should go to the residuary legatee; and of this opinion was the Lord Chancellor. (1)

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(1) The devise was of "all the furniture of his parsonage-house, and "all his plate, household goods, and "other goods (except books and papers) and all his stock within doors "and without, and all his corn, wood, "and other goods belonging to his "parsonage-house" to the wife.—She claimed the money, and bonds which were found in the *parsonage-house* at the time of the testator's death—but the Lord Chancellor was of opinion that they did not pass by such devise. Reg. Lib. B. 1730. fol. 254.(*x*)

(*x*) See *Hearne* v. *Wigginton*, 6 Mad. 119.

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Case 25.

1. Russ. & Myl. 643.

2. Keen. 561.

TERM. S. TRINITATIS, 1731.

WILLING *v.* BAINE.

Lord Chancellor KING.

2 Keb. 12.
2 Eq. Ca. Ab. 545. pl. 22. 572. pl. 2.
One gives a legacy of 200*l.* a-piece to his children payable at 21; and if any of them die before 21, then the legacy given to him so dying, to go over to the surviving children. One of the children dies in the life of the testator; though this legacy lapses, as to the legatee dying under 21, yet it is well given over to the surviving children.

A. by his will devised 200*l.* a-piece to his children, payable at their respective ages of twenty-one; and if any of them died before their age of twenty-one, then the legacy given to the person so dying, to go to the surviving children. He devised the residue of his personal estate to *A.*, *B.*, and *C.*, (being three of his children) and leaving made them executors, died.

One of the children died in the testator's life-time, and after the testator's death one of the executors and residuary legatees died. Upon this two questions arose, *first*, whether the legacy of the child that died in the life of the testator should go to the surviving children, or should be a lapsed legacy, and sink into the surplus? *Secondly*, whether when one of *the executors and residuary legatees died, his share of the residuum belonged to his executor, or to the surviving residuary legatees?

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As to the first it was objected to be the constant rule, that if the legatee dies in the life of the testator, this legacy lapses, which took in the present case; for here the child, the legatee, died in the lifetime of the testator: that it was true, there was a devise over of the legacy, in case any of the children should die before their age of twenty-one: but such clause could not take place in the present case, because there can be no legacy, unless the legatee survives the testator, the will not speaking till then; wherefore this must only be intended, where the legatee survives the testator, so that the legacy vests in him, and then he dies before his age of twenty-one.

On the other side it was said and resolved by the court, that the rule is true, that where the legatee dies in the life of the testator, his legacy lapses, (*i. e.*) it lapses as to the legatee so dying: but that in this case the legacy was well given over to the surviving children; for which 2 *Vern.* 207. *Miller* v. *Warren* was cited, where there was a devise of a legacy of 1500*l.* to *A.* payable at his age of twenty-one, and if *A.* died before, then to *B.* On *A.*'s dying in the lifetime of the testator, though this was never a legacy with respect to *A.* but lapsed as to him, by his dying in the life of the testator, still it was held to be well devised over. So in the case in 2 *Vern.* 611. of [A] *Ledsome* v. *Hickman.* In like manner, if *land* were devised to *A.* and if *A.* should die before twenty-one, then to *B.* on *A.*'s dying in the life of the testator, and before twenty-one, this would be a good devise over of the land to *B.*(1)

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One devises the surplus of his personal estate to his four executors; this is a joint bequest, and on the death of one shall go to the survivors as well in the case of a legacy, as of a grant.

With respect to the second point, it was contended, that it being the case of a legacy, and merely out of a personal estate, the construction of the spiritual court ought to prevail: now that does not allow of survivorship; but takes care that the benefit of the devise shall be equal, as was intended by the testator; which intention seemed here to have been in part complied with, by the executors having divided amongst themselves what had been already received. And Sir *Thomas Jones*, 130. *Bastard* v. *Stukeley*, also 1 *Chan. Cases*, 238. *Cox* v. *Quantock*, were cited for this purpose.

But it was held by the court, that there might be a joint legacy, as well as a joint grant; and that, as the executorship survived, there was the same reason, why the devise of the residuum should do so too; that the case in 1 *Chan. Cases*, is mentioned in the book to have been dissatisfactory to the bar, and to have been reversed on a rehearing; and the case cited afterwards in the same book, from 2 *Roll. Abr.* 301. is plainly against law; that a will coming into *Westminster-hall* to be construed, ought to be determined according to

[A] In the case of *Ledsome* v. *Hickman*, which was much the same with the principal case, according to our author's report of it, the Lord *Cowper*, both on the demurrer, and afterwards on the hearing of the cause, was clearly of opinion, that the devise did not take effect to the two surviving daughters, as a remainder or a devise over, but as an original devise, on the contingency of one of the devisees dying within age; and that, agreeably to what Lord *King* declared in the above reported case of *Willing* v. *Baine*, this would have been good, had it been in the case of a devise of land.

(1) Vide *Perkins* v. *Micklethwaite*, ante, 1 vol. 274.

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the rules of the common law. Wherefore it was decreed [B], that the surviving devisees of the residuum should have the benefit of such surplus, except as to what had been received and divided.(1)

[B] See the case of *Webster* v. *Webster*, vol. 2. 347.: but more particularly that of *Cray* v. *Willis*, vol. 2. 529. and Sir *Joseph Jekyll's* argument on this point.

(1) The Master was to certify what part of the testator's personal estate was divided to *Ann Bayne*, (the deceased executor) and the other residuary legatees in the lifetime of the said *Ann Bayne*, and her executors were to retain what was allotted to her on such division; and if the other three residuary legatees had not or did not retain their proportions thereof, then they were to be made equal with the said *Ann Bayne* out of the said residuary estate before the same was further divided—and the remainder was to be equally divided amongst the three surviving residuary legatees. Reg. Lib. B. 1730. fol. 388.

2. Rus the. 669.
2. Atkyns 187.
(9th) 3. Ch. 196.

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Case 26.

MR. HERBERT'S Case.

Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 222. pl. 7. 756. pl. 13. Marrying an infant ward of the court is a contempt, though the parties concerned in such marriage had no notice, that the infant was a ward of the court.

MR. HERBERT was an infant of about eighteen years of age, and seised of an estate of 1200*l. per annum;* and in a cause depending in this court, the guardianship of the infant was committed to the custody of Sir *Thomas Clarges*, as his guardian appointed by the court. Mr. *Herbert*, the infant, was sent to the university of *Oxford;* from whence coming to town upon some occasion, he was drawn in to marry a common servant maid, older than himself, and of no fortune. One *Philips*, a parson, married them; and he had several blank licences under the seal of the proper officer, which were used to be filled up by the said *Philips;* and one *Williams*, who pretended to be a counsellor at law, took upon him to be guardian to the infant, and to consent to his marrying this servant maid. Wherefore, being ordered to attend his Honour the Master of the Rolls, it was insisted, by way of excuse, by the parson and *Williams*, that they did not know Mr. *Herbert* was a ward of the court, and not knowing it, could not be guilty of a contempt of the court. And with regard to the filling up the blank licences, this was endeavoured to be justified by alleging it to be the common practice. The matter having been for some time debated, was

adjourned over for further consideration. Afterwards, on this day (*a*) the parties again attending, it was urged, that there had been several cases, where it did appear, that those who had drawn in infant wards of the court to marry, and had been instrumental in bringing about such matches, although they did not know that the infants were in wardship to the court, had yet been held guilty of a contempt, as in the case of Mr. *Willis* [C] who married the daughter and heir of Sir *Edward Hannes*, where the parson that married them, and other assistants in the marriage, were committed, and lay long in custody. So in the late case of Mr. *Cæsar* of *Hertfordshire*, who married Mrs. *Long*, a ward of the court, where Mrs. *Cromer* and her daughter, the contrivers of the match, were examined on interrogatories and committed, though it did not appear that in either of these cases the parties were apprised of the lady's being a ward of the court; and as to the blank licences, though this was admitted to be an usual practice, yet the same (it was said) ought highly to be discountenanced, as tending to promote unsuitable matches.

HERBERT'S Case.

(*a*) July 21.

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Master of the Rolls. With regard to what is alleged by way of excuse, that the parson and the pretended guardian had no notice of the infant's being a ward of the court; it is to be observed, that the commitment of the wardship to Sir *Thomas Clarges* was an act of the court, and in a cause then depending, of which every one at his peril is concerned to take notice, in the same manner as of a *lis pendens*. Surely it may be as well presumed every one is apprised of the proceedings of this court, as that all executors should be presumed to take notice of all judgments even (*b*) in the inferior courts of law, and therefore are not to pay bonds before such judgments, but at their peril. In the case of a writ of ravishment of ward brought by any subject, it is no excuse for the defendant to say, he did not know the party was a ward of the plaintiff's: and if this be so in a private case, *a fortiori* will it hold, where the public justice of the court is concerned. Besides, where the marriage of an infant is encouraged without the concurrence of his real guardians or relations, the consequences of such marriage ought to be at

Acts of the court, as the commitment of a wardship, and in a cause depending, to be taken notice of by every one at his peril.

(*b*) Off. Ex. cap. 12.

[C] See this case cited by the *Master of the Rolls*, in the case of Mr. Justice *Eyre* and the Countess of *Shaftesbury*, 2 vol. 112. where it is observed, that Mrs. *Hannes* was not taken (as here) from a guardian assigned by the court.

HERBERT'S Case.

the [D] peril of all those that are instrumental therein. If actual notice of the infant's being a ward of the court were necessary, then these offences would be continually practised with impunity: for it would be an easy matter to put other people not really privy to the acts of the court (in commiting the guardianship of the infant) to transact and bring about the marriage; for which reason, if the circumstances of the marriage are suspicious (as in the present case they unquestionably are, where one acts as guardian of the infant who never appears to have known him before, and acts too not for the benefit, but to the prejudice and probably to the ruin, of the infant) in such case (I say) all the parties to the transaction ought to be severely censured for example sake, and to deter others from the like offences. (*x*)

A parson obtains blank licences for marrying, under the seal of the proper officer, and afterwards fills them up; these are void notwithstanding.

And as to the blank licences for marrying; his Honour said it was a very ill practice, and that it seemed to him such a licence was void; that at the time of its being sealed by the officer it was plainly so, being with blanks; and if void when the seal was put to it, the same could not be afterwards made good by the parson's filling up the blanks with names; for then it would be the licence of the parson, and not of the ordinary.

[D] One, not a freeman of *London*, married a city orphan; and though it did not appear the party had any notice of his wife's being a city orphan, yet it was held, such person was punishable by the court of orphans; for every one is obliged at his peril to inform himself concerning the person whom he marries; and here nobody is obliged to give notice, consequently the party must at his peril take notice. 2 *Lev.* 32. 1 *Vent.* 178. *The King* v. *Harwood.*

(*x*) *Nicholson* v. *Squire*, 16 Ves. 259. A marriage in fact is sufficient to ground the contempt, *Salles* v. *Savignon*, 6 Ves. 572. *Bathurst* v. *Murray*, 8 Ves. 74. The endeavour to marry is a contempt, *Warter* v. *Yorke*, 19 Ves. 451. Marriage of a ward of court is punishable by indictment for a conspiracy, *Millett* v. *Rowse*, 7 Ves. 419. *Ball* v. *Coutts*, 1 V. & B. 292. *Wade* v. *Broughton*, 3 V. & B. 172.

1904. 2. Ch. 86.
1908. 1. Ch. 91.

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TERM. S. HILARII, 1731.

COWPER *v.* SCOTT ET AL'.

Case 27.

Sir JOSEPH JEKYLL, Master of the Rolls.

Devise of lands to trustees in fee, in trust within six years after the testator's death, to raise and pay 1500*l.* to his daughter A. A. dies within the six years; the 1500*l.* shall go to her administrator, here being no certain time limited when, but only the ultimate time within which, it shall be raised.

HENRY BEDEL, a freeman of *London*, had one son and six daughters, four of whom were married in his life-time, and advanced by portions. *Henry Bedel* made his will dated *August* 17, 1727, and thereby (having disposed of his personal estate, and likewise of part of his real estate, to and amongst his children) devised several freehold lands and tenements to certain trustees and their heirs, upon trust that they should, *within six years after his decease*, raise and pay out of the rents and profits of the premises 1500*l.* a-piece to his two youngest daughters; and also out of the rents and profits of the said premises pay interest at the rate of 4*l. per cent. per annum*, for the said 1500*l.* a-piece, until the same should be paid, for and towards their maintenance and education. *Mary*, the youngest daughter but one, married very improvidently to *Essen*, one of the defendants, and died within the six years without issue; and her husband insisted to have the 1500*l.* and interest paid to him as her administrator.

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Against which it was objected, that this 1500*l.* being payable within six years, could not be demanded until the six years were expired; that it was the same as if it had been said *at the end of six years*, and being a charge upon a real estate, it ought now to sink therein. Neither was the case altered by the daughter's having married within the six years; especially since the husband had made no settlement, and was so unsuitable a match for her. For which was cited 2 *Vern.* 617. *Carter* v. *Bletso*, where a man seised in fee devised lands to his eldest son in fee, with directions, that his eldest son should pay out of the lands to the testator's daughter *Mary*, 200*l.* at her age of twenty-one, with 4*l. per*

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cent. per annum, for maintenance in the mean time. *Mary* married, and died before twenty-one, whereupon the husband, as administrator to his wife, brought a bill for the 200*l.* but decreed, that the husband had no right thereto, because by the will there was only a direction to the son to pay the 200*l.* to the daughter at her attaining twenty-one, until which age nothing vested.

Sed per Cur. The payment of this 1500*l.* is not appointed to be at the end of six years, but to be made out of the rents and profits within six years, *i. e.* the trustees are to pay it within that compass of time, if it can be raised out of the rents and profits. So that here is no precise appointment when it is to be paid, but the six years are mentioned as the (*a*) ultimate time for that purpose; in the mean while it is to be paid as much sooner as it can. In the great case of (*b*) *Evelyn* v. *Evelyn*, lately determined, it was the unanimous opinion of the court, I mean of the Lord Chancellor, the Lord *Raymond*, and myself, that if a portion be to be raised out of rents and profits, and no time mentioned for the payment, it is payable presently, and becomes an interest vested; consequently, it will go to executors, &c. So, long before, in the case of Earl (*c*) *Rivers* v. *The Earl of Derby*, it was decreed, that where a portion was given to a daughter, and no time limited for the payment thereof; on the daughter's dying before marriage or twenty-one *(viz.* at her age of seventeen) it was a vested interest in such daughter: wherefore, this being a rule (1) so settled, his Honour would not suffer it to be further debated. But with regard to the interest of the 1500*l.* that being designed for the maintenance of the wife, and she being dead, it was ordered there should be no interest paid from the death of the wife.

(*a*) So, Wilson v. Spencer, post, 172. Where lands are charged with portions, and no time appointed for payment, the right to the portions vests immediately.

(*b*) Vol. 2. 666.

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(*c*) 2 Vern. 72.

I devise 100*l.* *per ann.* to my son A. and his wife for their respective lives; 60*l.* whereof to be paid to the wife for the support of herself and her daughter; the remaining 40*l.* to my son. The son dies; his wife shall have the whole 100*l.* *per ann.*

The next question upon the will was, the testator had appointed that the trustees should, out of the rents and profits of his estate, raise and pay unto his only son, *Henry Bedel*, and *Dorothy* his wife, over and above what he had before given them, 100*l.* *per annum*, during their respective lives, 60*l.* *per annum* of which 100*l.* *per annum*, should be paid to the son's wife for the better support of herself and daughter; the remaining 40*l.* *per annum*, to go to the testator's said son; the son died in the testator's life-time.

Whereupon it was now insisted, that the son's widow

(1) Vide *Duke of Chandos* v. *Talbot*, ante, 2 vol. 612, note.

should have but 60*l. per annum*, and not the 100*l. per annum*, for that the latter clause of the will imported a distribution how the 100*l. per annum* was to be paid: namely, 60*l.* to the wife, and 40*l.* to the husband, just as if the devise of the 100*l.* had been to the son and his wife for their lives, *habendum* 60*l. per annum*, part thereof to the wife, the remaining 40*l. per annum* to the son. Or, as if the testator had devised 100*l. per annum* to his son and his wife for their lives, that is to say, in manner following: 60*l. per annum* to the wife, and the remaining 40*l.* to the son; which latter words were therefore explanatory of the former, like the case where a devise is to *A.* and his heirs, *habendum* to *A.* and the heirs of his body. There the latter words (*a*) explain what heirs are meant. And it was observed, that the 60*l. per annum* given to the wife was not made payable to her during the coverture, or during the joint lives of her and her husband; but generally, and so must be intended for her life, as any general devise or grant must be taken to be for the life of (*b*) the devisee or grantee.

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(*a*) 1 Inst. 21. b.

(*b*) 1 Inst. 42.

Sed per Cur. Though this clause be unskilfully penned, yet it is plain and express, that the testator's son and his wife should have an annuity of 100*l. per annum* for their respective lives; and such express devise is not to be controlled by words that are doubtful, and barely capable of another construction. The testator may well be intended to have meant, that during the coverture, 60*l.* out of the 100*l. per annum*, should be allowed for the maintenance of the wife and her daughter; and not that the daughter's maintenance should remain a clog on the wife during her life, if she should happen to survive her husband, and when probably her daughter would have had another provision fallen to her on the death of her father, as in fact she had.

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Another question was, whether *Ann*, the youngest daughter, who was married to one Mr. *Searle*, might not claim her 1500*l.* given her by the will out of the real estate, and also her orphanage part?

A freeman of London by his will charges 1500*l.* on his real estate for his daughter, and also gives her 1500*l.* out of his personal estate. The daughter would take the 1500*l.* out of the real estate (as that is not within the custom) and also claim her orphanage part: but the court, in regard the testator had disposed of all his real and personal estate among his children, and intended an equal division, would not suffer the child to disappoint her father's will, but compelled her to abide entirely by the will, or by the custom.

For which purpose it was urged, that as the real estate of the freeman was quite out of the custom, so the orphan might claim that, or any derivative charge or interest thereout, over and above her orphanage part. And therefore, if

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a freeman advances a child by a real estate, and dies; this is not to be taken as any advancement, but such child shall have his full orphanage part besides. Nay, the turning the personal into real estate, though with a declaration at the same time that it is done purely with a (*a*) view to evade the custom, will yet be effectual for that end; that this was still stronger as to the lands of inheritance devised afterwards in this will to the daughter in tail, all which she might well claim, and also her orphanage part; for it could not be called a breaking into the custom, to claim that with which the custom had nothing to do; and if the youngest daughter might have these and likewise her orphanage part, her share of the latter would come to much more than the shares of her elder sisters who had received advancements from their father on their respective marriages, which the youngest had not.

(*a*) Babbington v. Greenwood, vol. 1. 530.

Sed per Cur. It appears upon this will, that the testator intended to make equal provisions for all his children, especially in case his son should die without issue male, which has happened in his life-time; he gave an estate in land to each daughter; he moreover gave to his son, and also to his six daughters, a seventh part to each of his personal estate, intending thereby an equal division of all his estate amongst his children. Wherefore, if any of the children shall go about to disappoint such intention, and prevent that equality which the will designed, such child shall be excluded from taking any benefit by the will, as well with respect to the real, as the personal estate; and not be allowed to elect what he likes best by the will, and entitle himself to the rest by the custom, but must abide by the will only, or by the custom only: and the difference is, where the will makes a disposition of the [A] whole estate, both real and personal of the testator amongst his children; and when it gives land

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[A] If the freeman gives a legacy to his child, and disposes of his whole personal estate, the child shall not have both the legacy and the orphanage part, even though the legacy does not exceed the dead man's part: *secus*, if the legacy be given expressly out of the testamentary part. *Hender* v. *Rose*, at the Rolls, *July* 4, 1718, and *Frederick* v. *Frederick*, vol. 1. 722. But in no case shall the child be obliged to make his election, till after the account taken. *Hender* v. *Rose*, ubi supra. (*x*)

(*x*) See note to *Pusey* v. *Desbouvrie*, post, 321. And see *Deg* v. *Deg*, ante, 2 vol. 419, and the cases collected in note (*z*).

and some share of the testamentary part to a child, who, in such case, may lay claim thereto, without crossing the rest of the will. But wherever the child's claim by the custom tends to frustrate and defeat the intention of the father, in all such cases he shall not be suffered to take any part by the will, either of the real or personal estate, if at the same time he would avail himself of the custom.

A., having seven children, makes an executor in trust, and devises to each child one seventh of his personal estate; one of the children dies in his life-time, and one of the six surviving children has been advanced by the father in his life-time; yet this child shall take his full share of the seventh part without bringing what he had before received into hotchpot.

The last point of the case was, the testator *Bedel* had devised all his personal estate in sevenths *(viz.)* * one seventh to each child; after which his son, being the eldest child, died in the testator's life-time, and then the testator died, by which means the son's seventh became distributable according to the statute, the executors being declared by the will to be but trustees; and four of the testator's daughters being married, and having been advanced by their father in his life-time, it was therefore contended, that this seventh, which was the son's share, becoming distributable according to the statute, the four sisters, who had been advanced by their father in his life-time, ought to bring their portions into hotchpot; for if the children are within the statute as to one clause, they must be within it as to every clause thereof.

Sed curia contra. Though this seventh part devised to the son, did, by his dying in his father's life-time, for necessity's sake become distributable according to the statute, yet I take this not to be in strictness within the same; because here is an executor, and therefore the testator cannot be said to have died intestate; though it is true the executor being but a trustee, is, by an equitable construction, and by means of an accident that has happened since the making of the will, a trustee for the next of kin according to the statute. However, this is (as I said) merely through necessity, and because no one else can take: but as to children who were advanced in their father's life-time, bringing such their advancements into hotchpot, that is to be only in the case of a *total intestacy*, or where the whole personal estate, not where part only, and that perhaps but a very small part, (as here) becomes distributable; neither would it be reasonable for the children so to do. And it is observable, that Mr. *Lutwyche*, who was of counsel with the deceased daughter's husband, and whose client's interest it was, to have the advancements of the four married daughters brought into hotchpot, gave up the point,

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saying, it had been so adjudged in Sir *George Wheeler's* case. (1)

(1) Sir *George Wheeler's* case is reported in Mos. 288, 301. by the name of *Wheeler* v. *Sheer*. The principal case is to be found in Reg. Lib. A. 1731. fol. 300, by the name of *Cowper* v. *Morson*. (*y*)

(*y*) *Walton* v. *Walton*, 14 Ves. 318.

Case 28.

EAST ET MARIA UX' *v.* THORNBURY.

Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 567. pl. 18. Interest recovered for a legacy, though after a receipt given in full for the legacy and the principal legacy paid.

THE bill was to recover the arrears of the interest of a legacy of 300*l.* after the principal legacy paid, and a receipt given for the same. The case was thus: one *Thomas Thornbury* gave by his will to his niece *Mary Thornbury*, now the wife of the plaintiff *East*, a legacy of 300*l.* payable a year after his death, and made his brother *Thomas Thornbury*, and his nephew the defendant *Thomas Thornbury*, then an infant, executors. *Thornbury*, the elder executor, died, and the defendant the younger, being but nine years old, administration with the will annexed was granted during his minority.

The plaintiff *Mary* marrying the other plaintiff *East*, they demanded the legacy of the defendant, who desired them to let it continue in his hands for about two years longer, and paid interest for the first year after the marriage, taking the plaintiff's receipt for the same, as for a year's interest due on the 13th of *April*, 1722, (being a year after the marriage) and afterwards another year's interest growing due, the defendant paid that year's interest and the whole principal, taking a receipt from the plaintiff for 15*l.* being a year's interest due for the legacy of 300*l.* to the 13th of *April*, 1723, at which time the plaintiff gave the defendant a receipt for 300*l.* left to the plaintiff *Mary* by her said uncle's will.

After seven years' acquiescence, the plaintiff demanded of the defendant the interest for the said 300*l.* legacy from the [127] end of the year after the testator's death, which happened in 1707, insisting by the bill, that the plaintiff by mistake took

the said legacy to have been made payable by the will at the marriage of the plaintiff *Mary;* whereas it now appeared thereby to have been payable a year after the testator's death.

For the defendant it was urged, that there was no pretence of fraud on his part, no concealing of the will which gave the legacy, no misinformation by the defendant that the legacy was not payable until the marriage; that the will had been proved in the spiritual court, where the plaintiff was at liberty, when he pleased, to see it; and as this legacy was part of the wife's portion, and the plaintiff a barrister at law, it must be presumed he had seen it; that the receipts appeared to have been drawn by the plaintiff himself, who delivered them to one who brought the money from the defendant, in the defendant's absence; that interest was pretty much in the breast of the court, and might be waived by the plaintiff, if he pleased. And it was compared to the case of a note given for a certain sum, which carries interest from the demand, though not expressed in the note, and for which the jury every day give interest: but if the person to whom such note is given will accept of the money without interest, it would be very strange to bring a bill in equity, or action at law, for the interest only; and yet that were a stronger case, being the case of interest for a debt due, which ought to be more favoured than interest for a legacy, which is a bounty.

Also it was said to be like the case, where a tenant having a right to deduct for the land-tax, does not however deduct, but pays his full rent; under which circumstances, a bill will [B] not lie in this court to recover back the tax, which ought to have been before allowed; for the tenant might, if

[B] So held by the Lord *Harcourt*, in the case of *Wildey* v. *The Coopers' Company*, *Michaelmas*, 1713, where the bill was brought by a tenant to be relieved out of the arrears of rent for the taxes the tenant had actually paid, on account of rent reserved to a charity that appeared to be exempted from taxes; and the bill was dismissed with costs. But more particularly in the case of *Atwood* v. *Lamprey*, heard at the Rolls, before Sir *Joseph Jekyll*, *Michaelmas*, 1719, where the case was, one in 1683, in satisfaction of a widow's dower, mortgaged land on condition to pay her 20*l. per annum;* whereupon the court held, that this being an annual payment secured by land, should answer taxes in proportion as the land paid; but refused to make the annuitant refund in respect of the payments she had received tax free, and for which the party paying had omitted to deduct. (*x*)

(*x*) So *Currie* v. *Goold*, 2 Mad. 163. *Denby* v. *Moore*, 1 B. & A. 123.

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he pleased waive deducting the tax, and so might the plaintiff waive the benefit of the interest of his legacy.

Sed per Cur'. It is plain, interest for the legacy was due: there is a certain time appointed by the will which gives it, *(viz.)* that it should be paid within a year after the testator's death. And as the plaintiff had a clear right thereto, so he has done nothing, for ought appears, to waive such right. The defendant himself admits the interest has not been paid, which, it is to be presumed, was occasioned by the plaintiff's having apprehended, that it was not due till after the plaintiff *Mary's* marriage; wherefore, as the interest is due, and admitted by the plaintiff not to have been paid, and was not intended to be waived, decree the defendant to pay the arrears of interest from the year after the testator's death, with costs of suit.

4. Mich. 188.

DE

TERM. S. MICHAELIS, 1731.

OSMOND *v.* FITZROY AND DUKE OF CLEVELAND, ET E CONTRA.

Case 29.

Sir Joseph Jekyll, Master of the Rolls.

2 Eq. Ca. Ab. 186. pl. 8. A father intrusts his heir apparent, then an infant, to the care of a servant. The heir comes of age; the servant takes a bond from the heir, which bond is secreted from the father, and the heir has not wherewithal to pay the bond; equity will set aside the bond as obtained by fraud and a breach of trust.

The Duke and Duchess of *Cleveland*, being about to send the Lord *Southampton*, their eldest son, to travel beyond sea, employed *Osmond*, who was plaintiff in the original bill, and defendant in the cross bill, as a servant to attend upon the young Lord, then an infant of about seventeen, and (as by the answer of *Osmond* it was admitted) *to prevent his being imposed upon*. Afterwards, on the Lord *Southampton's* returning from abroad, *Osmond* was continued in this service, and, when his Lordship was about twenty-seven years of age, prevailed on him to enter into a bond for the payment of 1000*l.* to him the said *Osmond*. The bond was prepared by *Osmond*, and kept secret from the Duke and Duchess. There were also some proofs of the weak capacity of the young Lord, and that at that time he was unable to raise money to pay off the bond. The original bill was to recover the money on the bond, which was alleged * to be mislaid, and the cross bill was to be relieved against the bond.

For the defendant in the cross cause it was argued, that if one who is at law allowed to be *compos mentis*, and consequently presumed to know what he does, intending to make a gift or benevolence, voluntarily enters into a bond without any fraud in the obtaining it; though on the obligor's death it may be void against creditors, yet it will be good against the obligor, and no ground for relief in equity: that in the present case here was no evidence of a want of care, much less of fraud, in *Osmond*, who was hired only to take care of the young Lord while an infant and during his travels, which trust was therefore now determined.

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Sed per Cur'. Where a weak man gives a bond, if there be no fraud or breach of trust in the obtaining it, equity will not

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A weak man gives a bond; if it be attended with no fraud or breach of trust, equity will not set aside the bond, only for the weakness of the obligor, if he be compos mentis. Equity will not measure people's understandings or capacities. No such thing as an equitable non compos, if compos at law.

set aside the bond only for the [A] weakness of the obligor, if he be *compos mentis;* neither will this court (1) measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity. But if a bond be insisted to have been given for a consideration, where it appears there was none, or not near so much as is pretended; equity will relieve against it. In the principal case there appears to have been a trust reposed by the parents in a servant to take care of an heir, and prevent his being imposed upon; and * the servant, instead of acting agreeably to his trust, himself imposes upon him. As to what is objected, that the trust was only to take care of the young Lord whilst an infant or during his travels; the trust continued so long as the servant remained in the service; and it is remarkable, that during his infancy, the law took care of this young Lord, who for that reason did not want so much the care of another: but when he was out of the protection of the law by being of age, then he stood most in need of the care of the servant. A breach of trust is of itself evidence of fraud, nay, of the greatest fraud: because a man, however careful otherwise, is apt to be off his guard when dealing with one in whom he reposes a confidence. The young Lord, by giving his bond for a sum which he was unable to raise, subjected himself to a gaol, and 1000*l.* was an exorbitant gift, for one who had no means of paying it.

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[A] The having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in those circumstances; for this were to encourage drunkenness: *secus* if through the management or contrivance of him who gained the deed, &c. the party from whom such deed has been gained, was drawn in to drink. By Sir *Joseph Jekyll*, at the Rolls, *Johnson* v. *Medlicott*, *May* 29, 1734. (*y*)

(1) But in *Griffin* v. *Deveuille*, *November* 16, 1781, the Lord Chancellor observed, that in almost every case upon this subject a principal ingredient was a degree of weakness *short of legal incapacity;* and that in this very case of *Osmond* v. *Fitzroy*, no relief probably would have been given, if the court had not considered Lord *Southampton* as more liable to imposition, than the generality of mankind. (*x*)

(*y*) *Cory* v. *Cory*, 1 Vez. Sen. 19. *Cooke* v. *Clayworth*, 18 Ves. 12.

(*x*) But see the report of this case of *Griffin* v. *Deveuille*, in 3 Wooddeson's Lect. App. 18. and 1 Mad. Cha. 224. from which it appears, that weakness of mind alone would not have been a sufficient ground for setting aside the bond in the principal case. And see *Bennett* v. *Vade*, 2 Atk. 324. *Aylward* v. *Kearney*, 2 Ba. & Be. 463.

The secreting the bond from the parents is also a further evidence of fraud; and young heirs, even when of age, are under the care of a court of equity. Wherefore this case, though a new one, yet comes within the rules (1) that have

Heirs, even when of age are under the care of a court of equity, and then want it most, the law taking care of them till that time.

(1) Besides the cases of actual fraud upon a contracting party, as where there has been *suppressio veri* or *suggestio falsi*, (vide *Broderick* v. *Broderick*, ante, 1 vol. 239), or where advantage has been taken of weakness of mind (vide *Clarkson* v. *Hanway*, ante, 2 vol. 203,) or of necessity, as in *Bosanquet* v. *Dashwood*, Ca. temp. Tal. 38. *Proof* v. *Hines*, Ca. temp. Tal. 111. *Thornhill* v. *Evans*, 2 Atk. 330. *Heathcote* v. *Paignon*, 2 Bro. C. C. 167. *Hawes* v. *Wyatt*, 3 Bro. C. C. 156, (*o*) or surprize, as in *Evans* v. *Llewellyn*, 2 Bro. C. C. 150. (*p*) there are other cases in which courts of equity will relieve against unequal contracts, (though executed) on principles of *public policy*, arising either from the *subject matter* of the contract, or the *relative situations* of the contracting parties. Of the first kind (which are also in some degree considered as *frauds upon third persons)* are the cases of marriage brocage (vide *Hall* v. *Potter*, Shower's Parl. Ca. 76. *Roberts* v. *Roberts*, ante, 66), of sales of offices (vide *Law* v. *Law*, post, 391), of underhand agreements upon marriage (vide *Turton* v. *Benson*, ante, 1 vol. 496. *Roberts* v. *Roberts*, ante, 66. note 1.), or upon composition with creditors (vide *Middleton* v. *Lord Onslow*, ante, 1 vol. 768.); and the court has expressed doubts how far transactions of this nature admit of subsequent confirmation. *Walmsley* v. *Booth*, 2 Atk. 30. *Cole* v. *Gibson*, 1 Vez. 507. *Shirley* v. *Martin*, (*q*) in Exchequer, *November* the 14*th*, 1779. *Kennett* v. *Greenwollers*, in Cha. *July* the 7*th*, 1792.(*r*) Of the second kind are transactions between guardian and ward (vide *Duke of Hamilton* v. *Lord Mohun*, ante, 1 vol. 118.), or persons between whom a similiar confidence has existed, as in *Osmond* v. *Fitzroy*, sup. *Cole* v. *Gibson*, 1 Vez. 503. *Griffin* v. *Deveuille*, in Cha. *November* the 16*th*, 1781, (where the plaintiff having lived for some time before he came of age with his sister and her husband, the court set aside securities obtained by the husband from the plaintiff upon his attaining his age of 21, considering the husband as much answerable to a court of equity as a guardian) (*s*); or between parent and child, *Glisson* v. *Okeden*, 2 Atk. 258. and 3 Bro. P. C. 560. *Cocking* v. *Pratt*, 1 Vez. 400. *Hawes* v. *Wyatt*, 3 Bro. C. C. 156 (*t*); or between attorney and client. *Proof* v. *Hines*,

(*o*) S. C. 2 Cox 263. *Crowe* v. *Ballard*, 3 Bro. C. C. 117, 1 Ves. Jun. 220. *Evans* v. *Cheshire*, Belt's Sup. to Vez. 300. *Pickett* v. *Loggon*, 14 Ves. 215. *Gibbins* v. *Creed*, 2 Sch. & Lef. 214. *Watt* v. *Grove*, 2 Sch. & Lef. 492. *Roche* v. *O'Brien*, 1 Ba. & Be. 330. *Strachan* v. *Brander*, 1 Eden. 303. *Wood* v. *Abrey*, 3 Mad. 417.

(*p*) *Purcell* v. *M'Namara*, 14 Ves. 91. *Smyth* v. *Smyth*, 2 Mad. 75.

(*q*) See statement of this case in *Roche* v. *O'Brien*, 1 Ba. & Be. 358.

(*r*) *Cockshott* v. *Bennett*, 2 T. R. 765. *Crowe* v. *Ballard*, 3 Bro. C. C. 117. S. C. 1 Ves. Jun. 215, and 2 Cox 253. *Morse* v. *Royal*, 12 Ves. 373. *Roche* v. *O'Brien*, 1 Ba. & Be. 330. *Dunbar* v. *Tredennick*, 2 Ba. & Be. 304.

(*s*) S. C. 3 Woodd. Lect. Ap. 16. *Purcell* v. *M'Namara*, ub. sup.

(*t*) *Palmer* v. *Wheeler*, 2 Ba. & Be. 18. *Tweddell* v. *Tweddell*, 1 Turn. 1.

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been observed in equity; and seeing the defendant *Osmond* in his answer to the cross bill sets forth that the bond in question is mislaid, I decree him to release the bond. [B] (*z*)

[B] On the 22d of *June*, 1734, this cause was reheard by the Lord Chancellor *Talbot*, when the decree at the Rolls was affirmed, and the 5*l.* deposit ordered to be paid to his Grace the Duke of *Cleveland*.

Ca. temp. Tal. 111. *Walmsley* v. *Booth*, 2 Atk. 25. *Oldham* v. *Hand*, 2 Ves. 259. *Welles* v. *Middleton*, in the House of Lords, 1785. (*u*) *Leigh* v. *Williams*, in the Exchequer, *November* the 17*th*, 1790. *Kennet* v. *Greenwollers*, in Cha. *July* the 7*th*, 1792. *Newman* v. *Payne*, in Cha. Mich. 1792 (*v*); or between a steward or agent and his principal, *Cray* v. *Mansfield*, 1 Ves. 381. *Gartside* v. *Isherwood*, 1 Bro. C. C. 558. *Fox* v. *Mackreth*, 2 Bro. C. C. 400. (*w*) *Crowe* v. *Ballard*, 3 Bro. C. C. 117 (*x*); bargains with heirs apparent, &c. for their expectations (vide *Twisleton* v. *Griffith*, ante, 1 vol. 310), or with sailors for their prize money, *Baldwin* v. *Rochford*, 1 Wils. 229. *Taylour* v. *Rochford*, 2 Ves. 281. *How* v. *Weldon*, 2 Ves. 516. (*y*)

(*u*) 1 Cox 112. 4 Tom. P. C. 245.

(*v*) 2 Ves. Jun. 199. *Gibson* v. *Jeyes*, 6 Ves. 266. *Harris* v. *Tremenheere*, 15 Ves. 34. *Wood* v. *Downes*, 18 Ves. 120. *Montesquieu* v. *Sandys*, ib. 302. *Strachan* v. *Brander*, ub. sup. *Lewes* v. *Morgan*, 5 Price 42.

(*w*) S. C. 2 Cox 320.

(*x*) S. C. 1 Ves. Jun. 220. *Purcell* v. *M'Namara*, ub. sup. *Huguenin* v. *Baseley*, 14 Ves. 273. *Harris* v. *Tremenheere*, ub. sup. *Watt* v. *Grove*, ub. sup. *Medlicot* v. *O'Donnel*, 1 Ba. & Be. 156. *Dawson* v. *Massey*, 1 Ba. & Be. 219. *Dunbar* v. *Tredennick*, 2 Ba. & Be. 304. *Selsey* v. *Rhoades*, 2 S. & S. 41.

(*y*) To these cases may be added the established rule respecting trustees where purchasing from themselves, as stated by the Master of the Rolls (Lord Alvanley). "That any trustee purchasing the trust property, is liable to have the purchase set aside, if in any reasonable time" (*Gregory* v. *Gregory*, Coop. 201. *Chalmer* v. *Bradley*, 1 J. & W. 59.) "the cestui que trust chooses to say he is not satisfied with it." *Campbell* v. *Walker*, 5 Ves. 680. *Fox* v. *Mackreth*, ub. sup. *Whichcote* v. *Laurence*, 3 Ves. 740. *Ex parte Reynolds*, 5 Ves. 707. *Ex parte Hughes*, 6 Ves. 617. *Ex parte Lacey*, 6 Ves. 625. *Lister* v. *Lister*, 6 Ves. 631. *Ex parte James*, 8 Ves. 337. *Downes* v. *Grazebrook*, 3 Mer. 207. *Whatton* v. *Toone*, 5 Mad. 54. *M'Neill* v. *Cahill*, 2 Bligh 260. *Chalmer* v. *Bradley*, ub. sup. A trustee however may buy from the cestui que trust, provided there is a distinct and clear contract between them, and no advantage taken by him of his character of trustee. *Coles* v. *Trecothick*, 9 Ves. 234. *Randall* v. *Errington*, 10 Ves. 423. *Morse* v. *Royal*, 12 Ves. 355. *Sanderson* v. *Walker*, 13 Ves. 601. *Downes* v. *Grazebrook*, ub. sup. *Naylor* v. *Winch*, 1 S. & S. 565.

(*z*) See *Nantes* v. *Corrock*, 9 Ves. 182.

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Case 30.
Bankrupts.
Sir JOSEPH JEKYLL, Master of the Rolls.

Cause by Consent.

A. seised in fee of a copyhold estate, surrendered the premises to the use of his will, and afterwards devised them to his daughter for life, then to trustees to be sold, and the money arising by the sale to be divided amongst such of his daughter's children, as should be living at the time of her death. The testator died, and the daughter had issue (among others,) a son, who was a trader; and becoming a bankrupt, the commissioners assigned over all the bankrupt's estate. The bankrupt got his certificate allowed, and then his mother died.

2 Eq. Ca. Ab. 89. pl. 14. 114. pl. 8. A contingent interest, or possibility in a bankrupt, is assignable by the commissioners. Devise to such of the children of A. as shall be living at his death; A. has issue B. who becoming a bankrupt, gets his certificate allowed, after which A. dies; this contingent interest is liable to the bankruptcy, forasmuch as the son in the father's life-time might have released it.

On a bill brought by the assignees for the bankrupt's share of the money arising by the sale, it was objected, that no manner of right to this contingent interest was vested at the time of the assignment made by the commissioners, any more than a right to lands can be said to vest in an heir apparent during the life of his ancestor; and the case of *Jacobson* v. *Williams* was cited, where it was held by the Lord *Cowper*, that the possibility of a right belonging to a bankrupt was not assignable.

But his Honour, upon debate, decreed (1) for the plaintiffs, distinguishing the principal case from that of *Jacobson* v. *Williams* (*a*); for there the husband, the bankrupt, could not have come at his wife's portion by the aid of equity, without making some provision for her; and it was not reasonable the assignees, who stood but in his place, and derived their claim from him, should be more favoured. Also the Master of the Rolls said, he laid his finger, and chiefly grounded his opinion, on the words of the statute of 13 *Eliz. cap.* 7. *sect.* 2. which enacts, "that the commissioners shall be empowered to assign over all that the "bankrupt might depart withal." Now here the son might,

(*a*) Vol. I. 385.

(1) Reg. Lib. A. 1731. fol. 188. by the name of *Higden* v. *Watkinson*.

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in his mother's lifetime, have released this contingent interest; so that the commissioners, by virtue of that act, are enabled to assign it, and consequently their assignees must be well entitled.

Lord Chancellor KING.

Note; in *Michaelmas* 1732, this cause came on by way of appeal before the Lord Chancellor *King*, who affirmed (1) the decree at the Rolls, partly for the reason before given, (*viz.*) because the bankrupt himself might have departed with this contingent interest; also, for that the act of 21 *Jac.* 1. *cap.* 19. *sect.* 1. declares, that the statutes relating to bankrupts shall in all things be largely and beneficially expounded for the relief of creditors: and further, because the statutes for discharging bankrupts on certificates never intended to entitle the bankrupt to any estate by virtue of any claim anterior (as his Lordship expressed it) to his bankruptcy, as the title in question clearly was; besides, the word *possibility* is in all the [C] latter statutes touching bankrupts.(2)

[C] See the 5 *Geo.* 2. *cap.* 30. the words of which are, "all such effects, of "which the party was possessed or interested in, or whereby he hath, or may ex- "pect, any profit, possibility of profit, benefit or advantage whatsoever."(*x*)

(1) Reg. Lib. A. 1732. fol. 54.
(2) Vide *Jacobson* v. *Williams*, ante, 1 vol. 382. *Jewson* v. *Moulson*, 2 Atk. 420.(*y*)

(*x*) See 6 Geo. 4. c. 16. s. 63.

(*y*) And see *Moth* v. *Frome*, Ambler 394.

DE

TERM. PASCHÆ, 1732.

John Gordon, Administrator of Barbara his late Wife. } Plaintiff;

Henry Raynes, Doctor of Laws, eldest Son and Heir of Sir Richard Raynes, Knt. } Defendant.

Case 31.

Lord Chancellor KING. Lord C. J. RAYMOND, Master of the Rolls.

Term of 1000 years to secure daughters' portions payable at sixteen; proviso, if no daughter at the time of failure of issue male, the portion to sink. There is a daughter, who attains to sixteen, and marries without consent, and no son by the marriage: but the daughter dies in the lifetime of the father and mother, and consequently while there might be a son; the portion sinks.

THE bill was, to compel the raising of the sum of 6000*l.* for the portion of *Barbara* the plaintiff's late wife, and the only daughter and issue of the defendant Doctor *Raynes*, by *Elizabeth* his late deceased wife; and to raise it out of a reversionary term of 1000 years, expectant on the defendant Doctor *Raynes's* death.

*Upon the marriage of the defendant, Doctor *Raynes*, with *Elizabeth Pleydell*, by indentures of lease and release, dated the 13th and 14th of *October* 1704, in consideration of that marriage, and of 5000*l.* portion, Sir *Richard Raynes* the father conveyed divers lands in *Surrey*, &c. to trustees and their heirs, to the use of the defendant, Doctor *Raynes*, for his life *sans* waste, remainder to trustees during his life, to support contingent remainders, remainder to the use of *Elizabeth* his intended wife for her life, for her jointure, remainder to the first, *&c.* son of the marriage in tail male successively, remainder to trustees for 1000 years, remainder to Doctor *Raynes* in tail male general, remainder to Sir *Richard Raynes* in fee.

The trust of the 1000 years term was declared to be, that in case there should be no son of the marriage born in the husband's lifetime, or after his death; or if there should be a son, and that son should die before twenty-one, and with-

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GORDON v. RAYNES.

out issue, and there should be one or more daughters born in the lifetime of the husband, or after his death; then that the trustees should by sale, demise, or mortgage, or by rents and profits in the mean time, in case such term should have taken effect in possession, raise the sum of 6000*l.* portion for the daughter of the marriage, if but one, and to be divided amongst them, if more than one, payable at their age of sixteen, if either the husband or wife should be then dead: but if both should be at that time living, then within six calendar months after the death of either the husband or wife, with interest for the same from the death of Doctor *Raynes* and *Elizabeth* his wife, or either of them; and in case any of the daughters should die before the portion became payable, her share to go to the survivors.

[136] Proviso, that if the next person in remainder should pay the portions to the daughter or daughters; or, *if at the time of such failure of issue male of the said Doctor* Raynes *(the husband) by* Elizabeth *his wife, to be begotten as aforesaid, there should happen to be no such daughter of their bodies begotten*, nor any such daughter to be afterwards born alive; or there being such, all of them should happen to die before their respective ages of sixteen, then, and in any of the said cases, the term to attend the inheritance.

The marriage took effect, and there was no son thereby, and but one daughter, who attained her age of sixteen in the lifetime of her father and mother, and without their consent intermarried with the plaintiff, Mr. *Gordon*, who never made any settlement on her. The daughter died in the lifetime of both father and mother, within four months after the marriage, and without issue.

In order to the determination of this case, the Lord Chancellor called to his assistance the Lord Chief Justice *Raymond* and the Master of the Rolls. When,

For the plaintiff it was insisted, that his having married the daughter without the consent of her parents, as also his never having made any settlement on her, together with her having died within four months after the marriage without issue: all these circumstances made no manner of alteration in the right to the portion; for that, supposing the plaintiff to have married with the parents' consent, to have made a settlement on his wife, and to have had issue by her living; if in these, or any of these cases, he had been entitled to the 6000*l.* portion, he must even now have the very same right

thereto, which depended on the words of the settlement made before marriage, and could not be varied by any subsequent accident, *quod curia concessit:* that at the age of sixteen (so often mentioned in the settlement) the right to the portion vested in the daughter, although the same was not raisable till within six months after the death of the father or mother, or one of them; and they compared it to the case of *Butler* v. *Duncomb*, (*a*) where a term of 500 years was limited, upon failure of issue male of the marriage, for raising portions for daughters, payable at twenty-one or marriage, which should first happen; and the trustees were to raise the portions by sale or mortgage, when the term should commence; and there it was agreed, that the right to the portion vested on the daughter's attaining twenty-one, her father being dead, so that there could be no son, and was an interest transmissible to her executors: but that the portion could not be raised until the mother died, in regard that until then the term was not to commence.

(*a*) Vol. I. 448.

That the clause of the trust of the term declaring, that in case there were several daughters, if any of them should die before the portion should be payable, her share should go to the survivor, implied, that if there had not been that declaration, it would have vested in such daughter so dying as aforesaid; and since no provision was made in case of there being but one daughter, it seemed natural to infer, that the right to the portion vested in such daughter. Also, as the mother brought 5000*l.* portion into the family, it would be hard that the daughter should marry and be entitled to no portion.

On the other side it was said, and so resolved by the court, that in the case of *Butler* v. *Duncomb*, the portion was held to be vested in all events at the daughter's attaining her age of twenty-one, though not raisable till the commencement of the term; whereas in the principal case it was not to vest until six months after the death of either the husband or wife, and the daughter happened to die in the lifetime of both. That this portion being to arise out of land, and the daughter dying before it became payable, the same sunk into the land, agreeably to the settled distinction between a portion secured out of a personal estate, and one charged on land, which rule

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Portion secured out of land, and the daughter dies before the portion becomes payable; it sinks into the land. So if a legacy be given out of land to J. S. payable at 21, and J. S. dies before 21; the legacy sinks. Secus in both cases, where the legacy or portion is given out of a personal estate.

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holds also with regard to legacies, [A] (*viz.*) if a legacy be given out of a personal estate to *J. S.* payable at his age of twenty-one, and he dies before twenty-one, yet the legacy shall go to his executors. On the contrary where a legacy is given out of a real estate payable at twenty-one, and the legatee dies before that age, the legacy sinks.

With respect to the clause of the trust of the term declaring, that in case there should be several daughters, and any of them should die before their portions became payable, in such case their portions should go to the survivors; this was said to be a distinct clause, to take place only where there should be several daughters, and could not any way affect or extend to the case where there was but one daughter; consequently it was nothing to the purpose: but if any use was to be made thereof, it might as well be inferred from thence, that as, where there should be several daughters, and one should die before her portion became payable, her executors or administrators were to be excluded: so where there was

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but one daughter, and she should happen to die before her portion became payable, neither should her representatives have any right thereto; that the proviso made it still plainer that the portion was to sink, this being, that if at the time of failure of issue male of the said marriage, there should happen to be no daughter of the marriage, then the 1000 years' term should be in trust to attend the inheritance: now no daughter of the marriage was living at the time of failure of issue male, and there was then a failure of issue male, when it became impossible there should be issue male, which was not while both husband and wife were living; nay, if the husband had died first, there would have been still a possibility of issue male, with which the wife might have been *privement enseint:* but when the wife died without issue, then and not before, there might be said to be a failure of issue male: that it could not be said, that at the death of the daughter, (though there was then no son) there was a failure of issue male; for a son might be born afterwards; so if such son had died, living both the father and mother.

[A] This distinction with regard to legacies, was agreed to and settled by the Master of the Rolls in the case of *Whiddon* v. *Oxenham*, 7 *July* 1731 (*x*); and as to portions, see *Jennings* v. *Looks*, 2 vol. 276. and the Duke of *Chandos* v. *Talbot*, 610.

(*x*) 2 Eq. Ca. Ab. 546. pl. 24.

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So that, in common sense and reason, the failure of issue male must be on the death of the wife without a son, which in this case had since happened.

Lastly, That although it might seem hard the daughter should marry and have no portion, notwithstanding her mother had brought 5000*l.* into the family; yet it must, on the other hand, be allowed to have been very reasonable, to leave the right to the daughter's portion in suspence and contingency during the joint lives of the father and mother, to the intent she might be in some measure kept in a dependence upon them, and under no temptation to marry improvidently, which was the very reason given in the case (*a*) of Sir *Willoughby* **Hickman* v. Sir *Stephen Anderson*. Also, that in the case of portions secured by marriage settlements, (regularly speaking) the court in the construction ought not to omit, or add any words thereto, for this would be not to construe, but make a settlement, especially where the settlement would bear a reasonable construction, as in the present case it plainly would. Wherefore, on the first speaking to the case, this bill for the portion was dismissed with great clearness, by the unanimous opinion of the Lord Chancellor, the Lord Chief Justice *Raymond*, and the Master of the Rolls: but without costs. (1)

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(*a*) 2 Vern. 655.

(1) Reg. Lib. A. 1731. fol. 361.

1 Tr. Keen. 243.

DA COSTA *v.* DA COSTA.

Case 32.

Lord Chancellor KING.

2 Eq. Ca. Ab. 453. pl. 9.

A father left a great personal estate to two infant children, and made his wife executrix. A bill was brought in the infant's name, by a relation, as prochein amy, to call the mother to an account. On affidavit of several other relations, that this suit in the infant's name was out of pique, and not for the infant's good, the court referred it to a Master, who reporting the matter to be so, the suit was stayed.

THE plaintiffs were the two infant children of *Joseph Da Costa Villa Real*, who lately died possessed of an estate of 150,000*l.* which by his will he gave equally between the defendant his widow, and his two infant children, and made his widow one of his executors. After the testator's death, a bill was exhibited in chancery in the name of the two infant children by *Joseph Mendes Da Costa*, who was their relation, as their *prochein amy*, to have an account and discovery of the personal estate of the plaintiffs the infants' father. To which bill the defendant was subpœnaed to appear and answer.

DA COSTA v. DA COSTA.

Whereupon several of the relations of the infants by the father's side, together with some of their relations by the mother's side, nearer than the *prochein amy*, made an affi-

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davit that due care was taken of the infants, and of their estate, with which they were well satisfied; and that they believed this suit was exhibited rather out of a pique than any real concern for the infants' benefit, there being a suit instituted in the spiritual court by the *prochein amy's* son against the infant's mother, upon a marriage contract alleged to have been made by her with him.

The Master of the Rolls on a petition (1) ordered that it should be referred to a Master to certify, whether this suit was brought for the benefit of the infants the plaintiffs, and whether it was proper the same should be prosecuted or not. (*x*)—The defendant to procure the report within a month. Pursuant to which the Master made his report, stating the fact as above, and that he did not conceive this suit, as now brought, was for the benefit of the infants, or proper to be prosecuted; but that he thought, if a proper bill were brought by a proper *prochein amy*, with a real intention to secure the estate of the infants, it might be for their benefit that such a suit should be prosecuted.

The agents for the defendant perceiving the opinion of the Master, filed a new bill in the infants' name by another *prochein amy*, for an account of the infants' estate, in order that it might be improved; and now moved the Lord Chancellor, that the former bill in the infants' name might be dismissed, and the *prochein amy* named therein, (*a*) pay the costs. (*y*)

(*a*) See Turner *v.* Turner, 2 vol. 297.

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Lord Chancellor: The report of the Master not being excepted to, must be taken to be [B] true. And since such

[B] A Master by his report certified, that the defendant had submitted to deliver part of the plate in question to the plaintiff, to which the defendant excepted, insisting that he had made no such submission. (*t*) Resolved that, by

(1) Reg. Lib. A. 1731. fol. 272.

(*x*) As to the power of the *prochein amy* to obtain this reference, see the judgment in *Taner* v. *Ivie*, 2 Vez. sen. 466., and contra, *Jones* v. *Powell*, 2 Mer. 141.

(*y*) As to a *prochein amy* of an infant being liable to costs, see *Taner* v. *Ivie*, ub. sup. *Whittaker* v. *Marlar*, 1 Cox 285. *Anon.* 4 Mad. 461. *Buckton* v. *Buckton*, 2 Dick. 794. *Pearce* v. *Pearce*, 9 Ves. 548. *Morgan* v. *Crumpton*, Bunb. 332.

(*t*) As to the *admission of a fact* by a party before the Master, see Lord Somers's Order, Oct. 28, 1696. Beames's Orders in Cha. 304.

report certifies, that it is not proper this suit should be prosecuted, not being for the infants' benefit, I shall not suffer any further proceedings upon it, at least as yet. But seeing the Master reports, that a suit may be brought for the benefit of the infants (*z*); and it does not at present appear whether the last bill comes within that description; all I shall do will be, to prevent the parties from proceeding in both bills, which would be vexatious. Wherefore let all proceedings stay on the first bill, in disfavour of which the Master has reported.

means of the report, the proof lay on the defendant, whose affidavit at least was necessary to falsify what had been certified; for, though there is no reason that the Master's report should be arbitrary and conclusive upon any one; yet it shall be presumed, *primâ facie*, to be true; and turn it on the other side to shew the contrary. By the Lord *Parker*, the seal before *Easter* term, 1720, *Allen* v. *Pendlebury*.

(*z*) Upon such a reference, the Master may point out any improvement that might be made in the form of the suit, or any other circumstance for the infants' benefit. *Sullivan* v. *Sullivan*, 2 Mer. 43.

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TERM. S MICHAELIS, 1732.

Case 33.

SOUTH SEA COMPANY *v.* WYMONDSELL.

Lord Chancellor KING.

2 Eq. Ca. Ab. 74. pl. 28. 101. pl. 7. The statute of limitations no plea where the bill charges a fraud; but then it should be charged by the bill, that the fraud was discovered within six years before the bill was filed.

THE *South-sea* company brought a bill against the defendant on a contract made by the defendant with Mr. *Surman*, the deputy cashier of the company, in the year 1720, touching 20,000*l.* *South-sea* stock; suggesting several frauds, and shewing, that by the (*a*) statute against the *South-sea* directors all the estate, goods, and effects, of the said *Surman* were vested in the company for the benefit of the proprietors. The defendant pleaded the statute of limitations, and that, if any such contract was made by the defendant with *Surman*, it was made above six years before the filing of the bill, and denied the matters of fraud.

(*a*) 7 Geo. 1. c. 27. In the case of the South-sea company, in whom the estates of the late directors are vested by act of parliament; where the statute of limitations might have been pleaded against the late directors, it is pleadable against the company, who stand but in such directors' place.

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It was insisted, that the plaintiffs claiming by the act of parliament, *that* was a matter of record, and the demand in question to be taken as a debt on record, consequently not barrable by the statute of limitations: and it was compared to an action for tithes on the statute of *Edward* the Sixth, or of debt on an (*b*) escape, *&c.*

(*b*) West. 2. c. 11. 1 Rich. 2. c. 12.

So where, though the assignee of the effects of a bankrupt claims under the act of parliament; yet as the statute of limitations might be pleaded against the bankrupt, by the same reason it is pleadable against such assignee.

But the Lord Chancellor held this to be clearly otherwise; for that the *South-sea* company could not be in a better case than *Surman* was, against whom, as the defendant *Wymond-*

sell might have pleaded the statute, so might he also do against the company, who stood but in *Surman*'s place; like the case of an assignee under a commission of bankruptcy, who, though he claims under the acts concerning bankrupts, and also by virtue of the assignment, which is under the great seal; yet, as he stands only in the place of the bankrupt against whom the statute of limitations is pleadable, so is he (the assignee) liable to be barred thereby.

It was then objected, that this bill was to be relieved against a fraud, and therefore not within the statute of limitations; fraud being a secret transaction, and probably not discovered within six years: and for this the Lord *Warrington*'s case was cited, where it was held in this court, and affirmed in the House of Lords, that a bill to be relieved against a fraud, was not within the statute of limitations. (*x*)

On the contrary it was said, if the fraud was known and discovered above six years before exhibiting the bill; this, though a fraud, would be barred by the statute of limitations; and that even in the case of the Lord *Warrington*, the statute was pleaded: whereupon the plaintiff, the Lord *Warrington*, was advised to, and accordingly did, amend his [145] bill, by charging, that he did discover this fraud within six years before exhibiting his bill. After which the Lord *Warrington had a decree*, and that decree was affirmed by the Lords, (as Mr. *Mead*, who was of counsel in that cause, informed the court;) wherefore it was insisted, that in the present case it ought to be charged in the bill, that the fraud was discovered within the six years, if the fact were so.

And of this opinion was the Lord Chancellor (*y*): but here being a charge of great frauds, and some circumstances thereof not fully denied, the defendant was ordered to answer the bill, with liberty for the plaintiffs to except, and the benefit of the statute of limitations to be saved to the defendant.

(*x*) *Booth* v. *Warrington*, 1 Bro. P. C. 445. And see *Bicknell* v. *Gough*, 3 Atk. 558. *Deloraine* v. *Browne*, 3 Bro. C. C. 633.

(*y*) See *Hovenden* v. *Annesley*, 2 Sch. and Lef. 634.

Case 34.
Lord Chancellor KING.

ATTORNEY-GENERAL *v.* RIGBY.

2 Eq. Ca. Ab. 201. pl. 2. One seised in fee of a manor, grants a rent in fee out of it, as a charity, for the support of several poor persons, and afterwards grants the manor to J. S. in fee; the nomination of the poor persons belongs to the heir of the grantor, and does not go with the manor.

ONE seized in fee of divers manors and lands in the county of *Lancaster*, granted a rent charge thereout of 20*l.* *per annum* for a charity, towards the support of several poor old men; and afterwards the founder of this charity granted the manors, lands, *&c.* that were charged with the 20*l.* *per annum* to *J. S.* and his heirs, and died. The question was, who should have the nomination of these poor men that were to partake of the charity; whether the grantee of the land, and his heirs, or the heir of the grantor of the charity?

After debate it was decreed, that the heir of the grantor should have the nomination, and that, the same being incident to the founder (1) and his heirs, or to those whom he should appoint, when the lands * were granted away, the rent-charge, a thing independent and collateral, did not pass therewith like a rent-service, which is incident to the reversion; whereas this being a rent-charge, and in fee, had no reversion. [A] But forasmuch as the grantees and owners of the land had for upwards of sixty years enjoyed the nomination of the persons, who had partaken of the charity; the court allowed to them all the payments they had made to any of the poor, though nominated by themselves, and would not disturb any thing that had been already done. (2)

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2 Ch. Ca. 126.

[A] A man founds a charity for alms-houses: the founder and his heirs have a right of nomination of these alms-people; but may forfeit it by a corrupt or improper nomination of such as are not fit objects of the charity, or by making no nomination at all; but this neglect of nomination must be after such time, as the founder, &c., have had notice of the vacancy; and without proof of such notice, it is no fault. By the Lord *Parker*, *Attorney-General* v. *Leigh*, *Trinity*, 1721. (*x*)

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(1) *Eden* v. *Foster*, ante, 2 vol. 326. *Attorney-General* v. *Price*, 3 Atk. 108. (*y*)

(2) Reg. Lib. A. 1732. fol. 46.

(*x*) See this case as stated in *Attorney-General* v. *Boultbee*, 2 Ves. jun. 389.

(*y*) *Attorney-General* v. *Boultbee*, ub. sup.

1. Y. & C. 273.

MORRICE *v.* HANKEY.

Case 35.

Lord Chancellor KING.

In an injunction, the words pro defectu placiti, &c. are intended of an issuable plea, and the words judicium intrare are intended of a final judgment; therefore if the defendant be in execution, and pleads plene administravit, and the plaintiff at law enters judgment de bonis testatoris cum acciderint, he may proceed to a scire facias to enquire of assets, and enter judgment thereupon; for the meaning of the injunction is, that the defendant may proceed so far, as that nothing shall remain, but to take out execution, after the injunction is dissolved.

THE question was, touching the breach of an injunction [B]. The defendant in this court brought an action against the plaintiff, as executor of *Humphrey Morrice*, esq. The defendant at law * brought a bill; and after the defendant in this court had delivered a declaration, upon such defendant's praying time to answer, the plaintiff got an injunction. The plaintiff at law proceeded there, and on *plene administravit* pleaded, took judgment *de bonis testatoris cum acciderint;* [*147]

[B] The words of such injunction are, that all proceedings shall stay; *licebit autem* for the defendant in equity, (who is plaintiff at law) *placitum ad communem legem postulare, et ad triationem inde procedere, et pro defectu placiti, judicium intrare; executio vero vigore præsentium retardatur.* After service of an injunction of this kind, the defendant at law put in a frivolous plea to an action of debt on a bond, which the plaintiff demurred to, and having gotten it made a *concilium*, after argument, obtained judgment. Also upon another bond, after the injunction served on the defendant and his attorney, they delivered a declaration. It was objected, first, with regard to the judgment, that this was a breach of the injunction; for that in one case only, (*viz.*) *pro defectu placiti*, was the plaintiff at liberty to enter judgment, and here was no want of a plea. Also, that the delivering a declaration in the other action was a manifest contempt, as had been often determined. With respect to the first, the Lord Chancellor strongly inclined to think this no contempt, since a frivolous plea is as no plea; and that, as the plaintiff at law might, by the express terms of the injunction, proceed to try an issue on the fact, by the same reason he might proceed to try an issue in law, which when the court had determined, and found the plea ill, is, upon the matter, no plea. And in relation to the second point, his lordship thought that, had there not been some resolutions to the contrary, the delivery of the declaration was no breach of the injunction, since by the very terms thereof the plaintiff is at liberty to proceed to trial, and the delivery, &c. is an incident, without which there can be no trial. By the Lord *Parker*, *Sidney* v. *Hethrington*, *Trinity*, 1719. (z)

(z) The practice at present is understood to be that the delivery of a declaration, is a breach of the injunction. *Garlick* v. *Pearson*, 10 Ves. 452. *Bullen* v. *Ovey*, 16 Ves. 141. *Mills* v. *Cobby*, 1 Mer. 3. It may be remarked, however, that the action in the last of these cases was an ejectment, where the declaration is the commencement of the action; whereas in other cases the writ, not the declaration, is the commencement of the action. See note in 2 Williams's Saunders, 1 c. Tidd's practice, 93, 147, 156.; and in *Bullen* v. *Ovey*, the act which the court held to be a breach, was not the filing or delivery of a declaration, but one which might have endangered the liberty of the party.

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after which he took out a *scire facias* in order to an inquiry of assets.

Whereupon it was moved that this was a breach of the injunction, being a proceeding after judgment; whereas the injunction only gave leave to enter judgment; that the *scire facias* was in nature of a new action on the judgment, which ought not to have been brought without leave of the court.

But by the *Lord Chancellor.* Not having heard any precedent cited in this case, I am therefore to be guided by the reason of the thing, and to prevent a delay of justice. It is admitted, that after an interlocutory judgment (as by default, or on demurrer,) the plaintiff may go on to ascertain his damages. Now the meaning of the rule in the present case is, that, notwithstanding the injunction, the plaintiff at law should be at liberty to proceed to an effectual judgment; all that the court intends to stop being the execution. (*x*) But the plaintiff at law is nevertheless allowed to proceed so far, as that he may be at liberty *eo instante* that the injunction shall be dissolved, to take out execution; neither is the *scire facias* like a new action upon the judgment, but a continuation only of the old one (*y*) on the same record with that, and in nature of a proceeding after an interlocutory judgment, to a final one. Wherefore the court ruled, that the bringing this *scire facias* was no breach of the injunction. (*z*)

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A scire facias is not in nature of a new action, but a continuation of the old one.

(*x*) In the Exchequer, an injunction to stay proceedings at law extends to all steps in a cause, except proceeding to trial where a plaintiff is in a condition to join issue in an issuable term in a country cause. See Fowl. Exch. Pr. 2d. Ed. 218.

(*y*) *Wright* v. *Nutt*, 1 T. R. 388. Tidd's Practice, 1099.

(*z*) In *Franco* v. *Franco*, 2 Cox 420., where an injunction had been obtained to restrain proceedings at law upon an award, which, before service of the injunction, had been made a rule of court in K. B. Lord Rosslyn held, that the obtaining a rule to shew cause why an attachment should not issue for non-performance of the award was no breach of the injunction; and that the rule might have been made absolute for attachment without breach, so as the attachment was not executed. In *Chaplin* v. *Cooper*, 1 V. and B. 16., an obligor in a joint and several bond had obtained an injunction in a suit to which his co-obligor was not a party; execution was afterwards taken out upon a joint judgment by the defendant in equity; and notice of the injunction was given to the sheriff, with directions to take co-obligor only, and not the plaintiff in equity; and this was held not to be a breach of the injunction.

NORTH *v.* EARL AND COUNTESS OF STRAFFORD.

Case 36.

Lord Chancellor KING.

2 Eq. Ca. Ab. 80. pl. 7. A bill is brought by a lord of a manor to recover a fine for a copyhold, on a suggestion, that the defendant was admitted by attorney, but sometimes pretends the attorney had no authority to take such admittance; the defendant answers as to part, and demurs as to relief; the demurrer held good.

THE plaintiff *North*'s father was lord of the manor of *D.* in *Suffolk*, of which Sir *Henry Johnson* held several parcels of copyhold by several quit-rents, and had been admitted to the same; and Sir *Henry* dying, these copyholds descended to his daughter and heir, the Countess of *Strafford*. Whereupon Mr. *Draycott*, the Lord *Strafford*'s agent, wrote a letter to the agent of Mr. *North* the father, (lord of the manor) desiring Mr. *North* would admit the Countess to these copyholds. Accordingly Mr. *North*, admitted the Countess by one Mr. *Bawdrey*, (who was also agent for Mr. *North*) her attorney, as tenant to the copyhold premisses, for which several fines were set, amounting to 40*l.*

Sometime after this, Mr. *North*. the then lord of the manor died, leaving the plaintiff Mr. *North*, his son and heir, and also executor, who brought this *bill against the Earl and Countess of *Strafford*, to recover the fine set upon the admittance, and likewise to be paid the quit-rents that were in arrear in the plaintiff's father's life-time, as also those that had incurred since his death. The bill further charged, that the lands out of which the quit-rents issued were not known, being by great length of time, and by the tenants having enjoyed those promiscuously with other lands, obscured with respect to the boundaries; but that the defendants had in their custody or power some writing or paper manifesting the said boundaries; also that the defendant the Lord *Strafford*, did now deny, that he gave any authority to his agent Mr. *Draycott*, or to Mr. *Bawdrey*, that his Countess should be admitted by Mr. *Bawdrey* as her attorney.

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43. Ch. D. 524.
(92) 2 Ch. 500.
(94) 2 Q. B. 424

The defendants, the Earl and Countess of *Strafford*, as to that part of the bill which sought to compel them to pay the arrears of the quit-rent, or which sought any relief touching the same, demurred, for that the plaintiff had his remedy at law for these arrears of quit-rent, either by distress or action of debt, on the statute of *H.* 8. The defendants did likewise put in another separate demurrer, as to such part of the bill as sought to compel them to pay the copyhold fine, or which prayed any relief touching the same.

NORTH v. Earl of STRAFFORD.

Lord brings a bill against tenant to recover a quit-rent alleging that the land out of which the quit-rent issues, by reason of the unity of possession of the lands out of which the rent is supposed to issue, with other lands, is not known; the defendant answers as to discovery, and demurs as to relief; the demurrer good, Quære.

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Against the demurrer it was urged, that the plaintiff's remedy was proper in equity, by way of commission to set out the boundaries of the copyholds, which were expressly charged by the bill to have been obscured through length of time, and by Sir *Henry Johnson*'s having enjoyed those copyholds promiscuously, * with other lands; and that the plaintiff could not have any remedy by distress and avowry, without particularizing the very lands out of which each rent issued; and that it had been settled to be a good equity, and a sufficient reason for suing in this court for a quit-rent of small value; that this objection was strengthened by the answer of the Earl himself, setting forth, that he did not know the particular lands that were copyhold, which made it necessary a commission should go. So that, if this demurrer held, the plaintiff would appear to have a plain duty due to him, and yet would be destitute of all remedy whereby to recover it. Also with respect to the admittance; if the lord should sue for the fine, the defendants might insist they never consented to such admittance; and in case the plaintiff were to sue for the forfeiture, on account of the defendants not having come in to be admitted, should the court-rolls be produced, the lord would hardly from them be encouraged to proceed against the defendants for a forfeiture in not coming in to be admitted.

But notwithstanding this objection, the court allowed the demurrer. The Lord Chancellor said, he had not known this case before of a demurrer as to relief. (*x*) That had there been no demurrer, the court on the hearing would have relieved: but here the defendant had not demurred as to any discovery, but as to relief only. So that, upon allowing the demurrer, the plaintiff was at liberty, if he should think the defendant had not answered the whole bill, to except as to any part; or might amend his bill, and enforce the defendant to discover his lady's admittance; that the plaintiff might proceed, and make proclamations to oblige the defendant's lady to come in and be admitted, and had at law a better remedy for his copyhold fine and arrears of

(*x*) This form was adopted in *Barker* v. *Dacie*, 6 Ves. 681. *Hodgkin* v. *Longden*, 8 Ves. 2. and *Todd* v. *Gee*, 17 Ves. 273.: but the modern practice is to demur generally. *Baker* v. *Mellish*, 10 Ves. 544. *Gordon* v. *Simpkinson*, 11 Ves. 509. *Pitts* v. *Short*, 17 Ves. 216. *Williams* v. *Steward*, 3 Mer. 502. *Attorney-General* v. *Brown*, 1 Swan. 294. *Roberts* v. *Clayton*, 3 Anst. 715.

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quit-rent, than this court could give him; for he might distrain, or bring debt, for the arrears of quit-rent due to him, as executor, and distrain for the arrears of quit-rent incurred since his father's death. (1)

And with regard to the fine; he said, either the Countess had been admitted, or she had not. If she had, the plaintiff might bring an action of debt, or an *indebitatus assumpsit*, for the fine, provided it was a reasonable fine, as he supposed it to be. If the defendant had not been admitted, the plaintiff might cause proclamation to be made, and on a default after three proclamations, might seize the copyhold as forfeited. For which reason his Lordship allowed the demurrer, it being only as to relief.(2)

Note: With respect to the copyhold fine, the plaintiff might bring his action at law for it; and need not, as it should seem, in his declaration set forth the particulars of the land held of him by the defendants by copy of court-roll; only, that the defendant's wife held certain lands within his manor, &c. But as to the quit rents, it seems the plaintiff must either in his action or avowry shew the particular lands; and in case the defendants in their answer set forth, that they do not know where these lands lie, or what they are, the plaintiff is entitled to a commission to set them out, and then the plaintiff being entitled to *this* relief, *quære*, whether the defendant's demurrer as to *all* relief, be good? (3)

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(1) Vide *Holder* v. *Chambury*, post, 256.

(2) Reg. Lib. B. 1732. fol. 19.

(3) Vide *Cocks* v. *Foley*, 1 Vern. 359. *Duke of Bridgwater* v. *Edwards*, 4 Bro. P. C. 139. *Benson* v. *Baldwyn*, 1 Atk. 598. *Duke of Leeds* v. *Powell*, 1 Vez. 171. *Duke of Leeds* v. *Corporation of New Radnor*, 2 Bro. C. C. 338, 518.

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Ex parte HOPKINS.

Case 37.

Lord Chancellor KING.

A rich uncle takes his niece into his house, maintains her there, and dies, having left her 10,000*l.* The executor continues to keep the niece in the house where he and the testator lived. The father of the child petitions, that she may be delivered to him. The child (of the age of 13) appears in court, and being examined denies she is under any force. The court is of opinion, that the guardianship of the child does by the law of nature belong to the father, but that the right thereto is not to be determined without a bill; that the father may take his child but not by force, nor in her going to, or returning from, court; and that the father may at all reasonable times have access to his child.

MR. HOPKINS, of *London*, merchant, seised and possessed of a great real and personal estate, had no wife or issue,

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but had a brother, the petitioner, and other relations of his name. His brother *Hopkins*, the petitioner, had three daughters, all which Mr. *Hopkins* the testator received into his house in *London*, and by his will (*inter alia*) gave to his said three nieces, daughters of his brother *Hopkins;* to the eldest, being now about the age of thirteen, 10,000*l.*, to the second, about the age of ten, 8000*l.*, and to the third, now about the age of eight years, 6000*l.*, to be severally paid them at their several ages of twenty-one or marriage, provided the marriage, if under twenty-one, should be with the consent of his executors; and in case of such marriage without such consent, then these legacies to go over respectively. The executors of the will were Sir *Richard Hopkins*, Mr. *Rudge*, and one Mr. *Hopkins*, cousin to the testator. Mr. *Hopkins*, one of the executors, inhabited in the house in *London*, where the testator died, and the testator's three nieces continued there.

The brother of the testator exhibited a petition to the Lord Chancellor, setting forth, that those three girls being his children, he consequently had a right to the guardianship of them, and praying, that they might be delivered over to him. The question was, whether the court could do this in so summary a way as on a petition only, and without a bill?

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It was objected, that matters of guardianship were of the same nature with those of lunacy, wherein the Lord Chancellor does, upon a petition only, dispose of and commit the custody to such persons as he thinks proper; and in the like summary way might determine the right of guardianship, especially in so plain a case as the present was; indeed, in doubtful cases, it is probable the court would order the party claiming the guardianship to bring a bill; that the application now made was the more reasonable, as an affidavit would be produced, proving that Mr. *Hopkins*, against whom this petition was exhibited, had been often seen to kiss the said testator's eldest niece, and to go into her chamber; and that there was reason to suspect him of some intentions to inveigle her affections in order to a marriage.

On the other side Mr. *Hopkins*, against whom this complaint was made, owned he had frequently saluted the testator's eldest niece, as being his relation, and whom he apprehended to have been in some measure under his care, being in the same house, and placed there by the testator: but that, whenever he saluted the eldest, he also saluted the

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two youngest, who being of such tender years, it could not be suspected he had any ill intentions: that the will of the testator had sufficiently guarded the young ladies against any improvident matches, by having devised over their portions, in case any of them should marry under twenty-one, without the consent of the executors. He moreover swore, that he had no undue design in saluting the testator's nieces, or any of them. Also Sir *Richard Hopkins* and Mr. *Rudge*, two of the executors, being then in court, declared, they had often heard the testator say, he never intended his nieces should be educated by their father and mother, since they would, as his expression was, *learn nothing there but low life.*

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Lord Chancellor: The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature; and it cannot be conceived that, because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right which naturally belongs to me, that of being their guardian. But notwithstanding this declaration, yet I am of opinion, and do not see any precedent (*a*) to the contrary, that I cannot in so summary a way as on a petition, and without a bill, deliver over the bodies of these infants to their father, any more than I could, on a bare petition, order a trustee to deliver over possession of the trust estate to the *cestui que trust*, who must in that case bring his bill, and so must the petitioner do here. There are legal remedies for the recovery of a ward, (*viz.*) a writ of [A] ravishment of ward, *homine replegiando*, and *habeas corpus*.

In the mean time the father having thus an undoubted right to the guardianship of his own children, if he can any

(*a*) See nevertheless the case of Mr. Justice *Eyre* and the Countess of *Shaftesbury*, and the Precedents there cited, 2 vol. 118.

[A] *Sed quære*, Whether this writ will lie, unless the defendant in the action takes away the ward? and as to a *homine replegiando* and *habeas corpus* (which last especially seems calculated only for the liberty of the subject;) if the parties brought up thereon will acquaint the court, that they are under no force, the court will let them go back to the places from whence they came; or, if they appear to be under restraint, will set them at liberty, but not deliver them into the custody of another, nor in a proceeding of that nature, determine private rights, as the right of guardianship evidently is; for then the parties would be concluded from any appeal or writ of error thereon. Possibly, in an action *de ejectione custodiæ*, the very right of guardianship might properly come in question; and thus, to the best of the editor's remembrance, it was determined in the case of *The King* v. *Smith*, in *B. R. Trin.* 7 *and* 8 *Geo.* 2.

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way gain them, he is at liberty so to do, provided no breach of the peace be made in such an attempt: but the children must not be taken away by him in returning from, any more than coming to, this court; and it will be a contempt in any person offering so to do.

And his Lordship asked the eldest daughter then in court, whether she was under any force, and where she would rather be? who replied, she was not under any force; and that, though she had all imaginable duty for her father and mother, yet her uncle the testator having been so kind to her by his will, she thought herself under an obligation to continue where he intended she should, and that she thought it to be his intention she should continue in the house where he himself had placed her. Whereupon the Lord Chancellor dismissed the petition: but directed Mr. *Hopkins*, who had the young ladies in his custody, to permit their father and mother, at all seasonable times, to have access to and see their children.

11. Q. B. D. 576.

Case 38.

COWPER *v.* CLERK.

Lord Chancellor King.

2 Eq. Ca. Ab. 229. pl. 14. A single copyholder is not relievable in equity for an excessive fine, because this is determinable at law. But, to avoid multiplicity of suits, several copyholders may join to be relieved against a general fine that is excessive.

The bill was to be relieved against an excessive fine, imposed by the defendant Sir *Thomas Clerk*, knt. upon Mr. *Spencer Cowper*, (late Mr. Justice *Cowper*,) for a water-mill, and some land, held of Sir *Thomas Clerk*'s manor of *Brickendon*, in *Hertfordshire*, by copy of court-roll.

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The case was thus: A miller was seised in fee of a mill and a small parcel of land within the manor of *Brickendon*, held *by copy of court-roll of the said manor, the stream of which mill run by some of the lands belonging to the late Mrs. *Cullen*'s seat and estate at *Hertingford-Bury*, in *Hertfordshire*; and banks were erected by the said miller in the lands of the said Mrs. *Cullen* (then an infant) by the consent of her guardian. Mrs. *Cullen* coming of age, sold her seat and estate at *Hertingford-Bury* to *Spencer Cowper*, esq.; who threatening to pull down these banks which were in his land, and which would in a great measure destroy the mill; the miller and Mr. Justice *Cowper* came to an agreement, that the miller should convey the mill, and a small parcel of land thereunto adjoining, unto Mr. Justice *Cowper*

in fee, who was to procure a licence from the lord of the manor to lease the copyhold mill and premisses, that before were let at a less rent, to the miller for ninety-nine years, at 20*l. per annum*. Accordingly, the miller surrendered the copyhold mill and premisses to the use of Mr. Justice *Cowper* and his heirs, who being thereunto admitted, did, by virtue of a licence from the defendant, Sir *Thomas Clerk*, demise the copyhold premisses to the miller for ninety-nine years, at 20*l. per annum* rent. But at present the improved value of the said mill, land, house, and barn built thereon, was about 60*l. per annum*.

The fines to be paid on descent and alienation of these copyholds were uncertain; and the defendant Sir *Thomas Clerk* set a fine on Mr. Justice *Cowper*'s admittance to the copyhold in question, of 120*l.* which he refused to pay, insisting that it was unreasonable, and that it ought to be according to the value of 20*l. per annum*, it having been so let with Sir *Thomas Clerk*'s privity (as was said, but not proved,) when he gave a licence to let it for ninety-nine years; indeed after the ninety-nine years should be expired, [157] the improved value might then be the measure of the fine. It was further urged, that the value of the mill was increased by the banks set up on Mr. Justice *Cowper*'s land, which he might pull down at pleasure; and therefore the benefit arising to the mill, in consequence of so precarious an advantage, ought not to enhance the fine.

On the other side it was said, that the banks having been erected on Mr. Justice *Cowper*'s land, by the consent of the infant's guardian: and, in consideration of the quiet enjoyment of these banks, great sums of money having been expended thereon, and the estate, with these banks then erected, having been purchased by Mr. Justice *Cowper*, it was not in his power to pull them down: that the matter complained of (*viz.*) the unreasonableness of the fine, was properly determinable at law, not in this court. Moreover, all the equitable circumstances of the bill, in respect of the fine set on Mr. Justice *Cowper* in his life-time, and likewise with regard to that demanded of the heir since his death, seemed fully answered by the proofs.

The Lord Chancellor was of opinion, that a bill could not be brought by a single copyholder to be relieved against an excessive fine; in regard the fine insisted to be excessive ought to be tried by a jury, before whom all the deposi-

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tions in the present case, touching the unreasonableness thereof would be proper evidence; though his Lordship admitted that a bill might lie in order to settle a general fine to be paid by all the copyhold tenants of a manor, to prevent a multiplicity (1) of suits; and that with this diversity were the cases cited for the plaintiff, from the first *Chancery Reports*, 8*vo.* (*a*) to be understood. Whereupon the plaintiff's bill was dismissed with costs. (2)

(*a*) See 1 Cha. Rep. 33. Middleton *v.* Jackson, and 96. Popham *v.* Lancaster.

(1) Vide *Disney* v. *Robertson*, Bunb. 41. *Baker* v. *Rogers*, Sel. Ca. in Cha. 74. *Mayor of York* v. *Pilkington*, 1 Atk. 282. *Bouverie* v. *Prentice*, 1 Bro. C. C. 200. (*x*)

(2) Reg. Lib. A. 1732. fol. 117.

(*x*) *Lord Tenham* v. *Herbert*, 2 Atk. 483. *Wake* v. *Conyers*, 2 Cox 360. S. C. 1 Eden 331. *Dilly* v. *Doig*, 2 Ves. Jun. 486. *Hanson* v. *Gardiner*, 7 Ves. 310. *Weale and the West Middlesex Waterworks*, 1 J. and W. 369. *Corporation of Malden* v. *Coates*, 4 Mad. 447.; and see *Holder* v. *Chambury*, post, 257. n. 1.

1. Young & C. 106.

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Case 39.

LAKE *v.* CRADDOCK, ET AL'.

On an Appeal from a Decree at the Rolls.

Lord Chancellor KING.

Five persons purchased West Thorock level from the commissioners of sewers, and the purchase was to them as joint-tenants in fee; but they contributed rateably to the purchase, which was with an intent to drain the level: after which several of them died; they were held to be tenants in common in equity and though one of these five undertakers deserted the partnership for thirty years yet he was let in afterwards, and on what terms.

THE case was thus: Great part of the lands in *West Thorock*, in *Essex*, having been overflowed by the river *Thames* near *Dagenham*, and the land-owners not thinking it worth their while to pay the assessments made on them by the commissioners of sewers; the commissioners decreed the lands to be forfeited, and conveyed them to three trustees in trust to sell, and raise money for the draining of these overflowed lands. The defendant *Craddock*'s father, the plaintiff *Lake*, and three others, (five in all) having entered into an undertaking to drain the level, or overflowed lands of *West Thorock*, the trustees for the sale, by the consent and direction of the commissioners of sewers, did, by deed indented and inrolled, dated the 8th of *February* 1695, in consideration of 5145*l.* paid to the commissioners by the five pur-

chasers, convey this level to the defendant *Craddock*'s father, the plaintiff *Lake*, the three others and their heirs; upon which several sums of money were expended in carrying on the undertaking; and in 1699, the defendant *Craddock's* father paid his last contribution, which, with what he had advanced before, came in all to 1025*l.* Afterwards, it seeming to be an enterprize, which would prove very expensive, and there being some uncertainty as to the success of it, the defendant *Craddock*'s father wholly deserted it, and never more concerned himself therewith.

The four other undertakers were advised, that some neighbouring lands would be of service to their design: upon which, in *April*, 1703, they purchased the manor of *Porretshalls* in *West Thorock*, of the Lady *Smith*, for 2550*l.*; [159] and in *February* following, purchased the moiety of the rectory and tithes of *West Thorock*, for 1400*l.* of Sir *Charles Tyrrel*; which two purchases were thought useful in the undertaking, and were made in the names of the four undertakers, omitting *Craddock;* nor did it appear that he was ever consulted therein, or desired to contribute to the purchase. *Craddock* the father died, leaving the defendant *Craddock* the son his heir and executor. The plaintiff, Sir *Bibye Lake*, one of the original partners, brought this bill against the rest of the partners, or their representatives, for an account and division of the partnership estate. And on the first coming on of the cause at the Rolls, his Honor referred it to the Master to state a case between the parties, for the judgment of the court. And the Master having made his report, the cause was thereupon heard, when the principal (or rather the only) question was, whether these five purchasers, having made this purchase jointly, so as to become in law jointenants, the same should survive in equity?

The Master of the Rolls, on debate, (*a*) decreed, that the survivorship should not take place; for that the payment (1) of money created a trust for the parties advancing the same; and an undertaking upon the hazard of profit or loss

(*a*) Trin. 1728.

(1) Vide *Rigden* v. *Vallier*, 3 Atk. 731. and 2 Vez. 258. S. C. *Partridge* v. *Pawlet*, 1 Atk. 467. and 2 Atk. 55. S. C. *Hall* v. *Digby*, 4 Bro. P. C. 224. (*x*)

(*x*) *Lyster* v. *Dolland*, 1 Ves. Jun. n. (*b*). *Aveling* v. *Knipe*, 19 Ves. 431. *Jackson* v. *Jackson*, 9 Ves. 597. 441.

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was in the nature of merchandising, when the *jus accrescendi* (*b*) is never allowed; that, supposing one of the partners had laid out the whole money, and had happened to die first, according to the contrary construction, he must have lost all, which would have been most unjust. Wherefore it was decreed, that these five purchasers were tenants in common, not only as to the level lands, which were first purchased, but also with respect to the lands bought afterwards by the four undertakers, of the Lady *Smith*, and Sir *Charles Tyrrell*; but that the defendant *Craddock* ought not to have the benefit of this tenancy in common, unless he would pay so much money as would make up what had been already advanced by his father, equal to what had been contributed by each of the other partners, together with interest for the same, from the respective times that *Craddock* the father ought to have made those payments; and on the defendant *Craddock*'s paying the same, then all the said lands to be divided into five parts, the defendant *Craddock* to have one fifth; but, on default of payment, the defendant *Craddock* to be excluded, and the lands to be divided and distributed into four parts among the four other partners.

(*b*) 1 Inst. 182. 1 Vern. 217. 2 Lev. 188, 228.

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From this decree the defendant *Craddock* appealed to the Lord Chancellor, insisting, that he ought either to receive back the 1025*l.* which it was admitted his father expended in this undertaking, or to be allowed to come in for a share of the level only, and not to be bound to contribute towards the two purchases made by the four other undertakers, of the Lady *Smith* and Sir *Charles Tyrrell*; that the four other undertakers had chosen to make these two purchases in their own names only, by which they seemed to have excluded *Craddock* from all concern therein, and of which, had it proved never so beneficial, he would have had no means of forcing them to admit him to a share; and therefore, now it had turned out a losing bargain, there could be no reason to compel him to bear a proportion of the loss. Besides, there was nothing in the articles empowering the partners, or the major part of them, to buy lands; and by the same reason that they would oblige *Craddock* to pay his share towards these purchases, they might, if they had fancied buying half the country, have compelled him to contribute to that also; that it was difficult to conceive how the uplands thus purchased, much less the tithes, could be of any use in the undertaking; though as to the charge of draining the level,

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exclusive of the two purchases, the defendant *Craddock* was willing to advance his proportion.

It was moreover pretended, that the decree was unreasonable on account of its having directed, that the defendant *Craddock*, in order to be admitted to one-fifth, should pay not only his proportion of these two purchases, but also of the interest of the purchase money, from the time that his father ought to have made these payments; whereas the direction ought to have been, that an account should be taken of the profits of these two purchases, which profits might have amounted to as much as the interest, or if not to quite so much, yet that the defendant *Craddock* ought to pay no more towards such interest, than the deficiency of the *quantum* of the profits would come to.

To which it was answered by Mr. Solicitor *Talbot;* that as the defendant *Craddock's* father and himself had for so long a time (near thirty years) relinquished and abandoned the partnership; and in regard the defendant *Craddock* had no manner of right thereto, but through the indulgence of a court of equity, (it being by law a jointenancy, and as such belonging to the survivors;) it was a favourable decree to let him in upon any terms, and surely the terms now offered him must appear reasonable, *(viz.)* that he should, upon his contributing to all the expenses that had been contracted and incurred by reason of any purchases, or otherwise in the prosecution of the undertaking, be admitted to one-fifth of the partnership; that had the defendant *Craddock* brought [162] his bill for the benefit of such undertaking, he could not have hoped to succeed on any other conditions; that it was still stronger against him, in that he now seemed to decline meddling with the undertaking; so that here was rather great favour shewn him, than any hardship imposed; that he was not absolutely, and at all events, bound by this decree to pay his proportion towards the new purchases, but had it in his election, whether he would do it or no; that as to the interest which was required of him, previous to his being admitted into the partnership, it was reasonable he should pay it for his default in not having contributed his share of the principal before, which, if he had done, he would not have been charged with the interest; and this was some disadvantage to the other four partners, who had been deprived of their arrear of interest for near thirty-five years; that in truth the design of the defendant *Craddock* appeared

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to be to delay matters, and to defer the bringing in of his money and interest, till such time as this long account of the profits should be taken, which would require many years; and that, if the defendant's share of the profits of these two purchases should exceed his proportion of interest, the surplus, on the making up of the accounts, must be paid him. For which reasons the decree of the Master of the Rolls was [B] affirmed.

[B] *Nov.* 1733, under the name of *Lake* v. *Gibson et al'*, (*y*) and the 10*l.* deposited with the Register, ordered to be divided between the plaintiff and the other defendants, who were four of the proprietors of the marsh lands in the pleadings mentioned.

(*y*) 1 Eq. Ca. Ab. 290. Pl. 3.

3. Eq. 352.
5 Sim. 628.

DE

TERM. S. HILARII, 1732.

SIR SAMUEL MARWOOD, BART., *v.* CHOLMLEY TURNER, ESQ.

Case 40.

Lord Chancellor KING.

2 Eq. Ca. Ab. 469. pl. 18. 775. pl. 22, 23. Tenant in tail male, remainder to himself in fee, devises his lands to J. S., and then suffers a recovery to the use of himself in fee, and dies without issue male; this is a revocation of the will.

SIR HENRY MARWOOD, Baronet, seised in tail male, with remainder to himself in fee, of a considerable real estate in *Yorkshire*, and also seised of an estate for three lives of the manor of *Stanton*, in *Yorkshire*, held of the Archbishop of *York*, and granted by the Archbishop to Sir *Henry* and his heirs, for three lives, made his will dated the 7th of *June*, 1711, whereby taking notice, that his nephew the plaintiff (now Sir *Samuel Marwood)* would be entitled to the baronetship, in case he survived his father, and the testator his uncle, the testator did by his said will devise a considerable part of his freehold estate to his nephew, the plaintiff, for his life, remainder to trustees to support contingent remainders, with remainder to the first, &c. son of the plaintiff in tail male successively, remainder over: and devised his said leasehold estate to two trustees, and their heirs, during the three lives; [164] expressing an ardent desire, that the trustees would take care, from time to time, to renew the lease, and use their utmost endeavours to preserve the estate to the heirs male of the family, as long as the honour of baronetship should continue therein, and made the defendant, *Cholmley Turner*, executor. Sir *Henry* had no issue male, but the plaintiff was his nephew, *(viz.)* his next brother's eldest son; and the heir at law of Sir *Henry* was his grand-daughter *Jane*, being the daughter of his only deceased son, and married to the defendant, *Cholmley Turner*.

After the making of the will, Sir *Henry Marwood* did by lease and release convey the estate of which he was seised in tail male, &c. to the trustees and their heirs, to the use of them and their heirs, in order to make them tenants to the

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præcipe for suffering a common recovery; which common recovery is, in the beginning of the deed, said to be for the docking and barring of all estates tail and remainders, and for vesting the fee-simple of the premises in Sir *Henry* and his heirs. And the recovery is by this deed declared to be, to the use of him and his heirs, after which a recovery was accordingly suffered, in which Sir *Henry* was vouched. The testator also, after the making of the will, surrendered his lease for lives, and took a new lease of the Archbishop of *York*, to him and his heirs for three lives, and put in his grandson, *Cholmley Turner*, as one of the lives; the deeds and recovery were executed and suffered in 1718; Sir *Henry Marwood* died the 28th of *October*, 1725.

Upon the back of the will these words were written (and as supposed) by the testator's own hand; *this is my will:* afterwards these words were written; *but not now so intended to be.*

[165] In the spiritual court, by reason of these words, *but not now so intended to be*, the will was set aside, and administration granted generally to *Henry Pierce*, a daughter's son of Sir *Henry Marwood;* though this (it was said) was done without much opposition from the defendant *Cholmley Turner*, the executor thereof; but whose interest it was to contest the will, as to the real estate.

With respect to the freehold estate; the common recovery, and the deed by which the premises were conveyed to trustees and their heirs, declaring the use of the recovery to Sir *Henry Marwood*, and his heirs; these being all subsequent to the will, and inconsistent therewith, as declaring the premises should go to his heir at law, and not to his devisee; it seemed to be not much opposed, but that the same were a revocation. Besides a common recovery, as it is a solemn conveyance upon record, and stronger than a feoffment, must needs be a revocation; the recovery being suffered by the tenant in tail, plainly gains an absolute fee derived out of that estate-tail, and which fee was never devised; consequently it must be even stronger than the case, where a man having lands, devises them, and afterwards makes a feoffment of them, though to the use of himself and his heirs, and though this use be the old use, and the old estate, yet according to the several cases in 1 *Roll's Abr.* 614, title *Devises revoked*, this is a revocation; and the case in 3 *Levinz* 108, *Dister* v. *Dister*, was cited as in the very

point; of which opinion was also the Lord Chancellor. (1)

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A lease granted to one and his heirs for three lives, is a real estate; and though by the statute of frauds it is made liable to pay debts, yet it is only such debts as bind the heir; and where the spiritual court set aside a will disposing (inter alia) of such estate as revoked; this sentence did not affect the devise of such real estate.

With regard to the other point; it being written on the back of the will, *this is my will, but not now so intended to be;* and the spiritual court having construed this to be a revocation of the will, and thereupon granted administration, as if Sir *Henry Marwood* had died intestate: the Lord Chancellor, *primâ facie,* inclined to think that this estate *pur autre vie* was, since the statute of frauds, to be taken as personal estate: from whence it would follow, that the will being set aside in *Doctors' Commons*, the whole disposition of the personal estate thereby was void; and consequently that the will, as to this leasehold estate, fell to the ground, especially as a lease *pur autre vie* is now made liable to pay debts.

To which it was answered (and the court at length allowed of the answer) that the lease being granted to Sir *Henry* and his heirs for three lives, this was a freehold descendible, and a real estate; and though by the statute of frauds it is made liable to debts, yet it is only to debts by specialty wherein the heir is bound, and consequently to such debts only as a fee-simple estate is made liable to.(2) Then this being a real estate, what would be a revocation of a will as to a personal estate is no revocation thereof in regard to this; and such an indorsement only, especially since it did not appear

(1) *Parsons* v. *Freeman*, 3 Atk. 741. (*x*) and 1 Wils. 308. S. C. *Darley* v. *Darley*, 3 Wils. 6. and 7 Bro. P. C. 177. *Sparrow* v. *Hardcastle*, 3 Atk. 803.(*y*) Et vide *Martin* v. *Strachan*, 1 Wils. 2. 66. 2 Stra. 1179. and 4 Bro. P. C. 486. S. C. *Roe* v. *Griffith*, 4 Burr. 1952. *Arnald* v. *Arnald*, 1 Bro. C. C. 401. (*z*)

(2) Vide *Duke of Devon* v. *Atkins*, ante, 2 vol. 381.

(*x*) And see Lord Loughborough's statement of this case in *Brydges* v. *Duchess of Chandos*, 2 Ves. Jun. 431.

(*y*) S. C. Amb. 224. 1 Dick. 256.

(*z*) *Doe* v. *Delnot*, 2 N. R. 401. *Doe* v. *Llandaff*, ib. 503. *Shove* v. *Pincke*, 5 T. R. 124, 310. *Brydges* v. *Duchess of Chandos*, ub. sup. *Temple* v. *Duchess of Chandos*, 3 Ves. 685. *Williams* v. *Owens*, 2 Ves. Jun. 595. *Cave* v. *Holford*, 2 Ves. Jun. 604, n. S. C. 3 Ves. 650. sub. nom. *Goodtitle* v. *Otway*, 1 Bos. & Pul. 576, and 7 T. R. 399. *Dingwell* v. *Askew*, 1 Cox 427. *Hawes* v. *Wyatt*, 2 Cox 263. S. C. 3 Bro. C. C. 156. *Darley* v. *Darley*, 1 Dick. 397. S. C. Amb. 653. *Knollys* v. *Alcock*, 5 Ves. 648. 7 Ves. 558. *Harmood* v. *Oglander*, 6 Ves. 198. 8 Ves. 106. *Attorney-General* v. *Vigor*, 8 Ves. 281. *Reid* v. *Shergold*, 10 Ves. 370. *Charman* v. *Charman*, 14 Ves. 580. *Vawser* v. *Jeffery*, 16 Ves. 519. 2 Swan. 268. 3 B. & A. 462. *Elton* v. *Harrison*, 2 Swan. 276 n. *Jackson* v. *Hurlock*, 2 Eden. 263. *Bennett* v. *The Earl of Tankerville*, 19 Ves. 170. *Rawlins* v. *Burgis*, 2 V. & B. 382. *Ward* v. *Moore*, 4 Mad. 368. As to the effect of a subsequent mortgage, see *Rider* v. *Wager*, ante, 2 vol. 334.

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One seised of a lease for lives, devises it, and afterwards renews; the renewal is a revocation of the will.

whose handwriting these latter words were, [but not now so intended to be] could be no revocation.

The only remaining question of difficulty was, whether Sir *Henry Marwood's* surrendering the old lease, and taking a new one to him and his heirs for three lives, subsequent to the will, was a revocation of the will?

[*167] *And it was insisted for the plaintiff, that this was no revocation: for that it would weigh with the court, what ardent desires the testator had expressed in his will, that his trustees, to whom this lease was devised, should use their utmost endeavours to continue the lease in the male line, as long as there were any to inherit the honour; that as to the surrender of the old lease, this being only to take a better and more beneficial estate, was all intended for the advantage of the devisee, to give him a larger, a more extensive interest than he had before, and to increase the bounty that was before designed him; now to make such an intended act of kindness a destruction of the will would be to invert, in the highest degree, the meaning of the testator; that the renewal of a lease was only a grafting upon the old stock, which must be of the same nature with that stock, a continuation of the same estate, with some little addition to it; that this was demonstrated by the common case, where a trustee of a lease for lives, when all the lives but one are expired, renews for the old life and two new ones, and the old life dies; here, though the trustee renews the lease out of his own pocket, and though the lease had been quite at an end, if he had not renewed; yet this renewed lease shall be taken to be subject to the same trusts as the old lease was, and a continuation of the same estate; that a considerable part of the revenues of the kingdom consists of leases either from the church, or colleges, or lords of manors, especially in the West: and that it is very usual to make provisions for younger children out of these leases, which commonly require a renewal every seven years, or upon the dropping of a life; and if one so seised or possessed, having made his will, and thereby provided for a younger child or children, should soon afterwards renew the
[168] lease, but forget to republish his will (which might often happen) if the child should be thereby left unprovided for, such a construction might create the greatest inconveniences; that no judgment at law, nor one decree in equity, had been cited, whereby it had been determined, that the bare renewal of a lease was a revocation of a will.

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In 2 *Vern.* 209. *Alford* v. *Alford*, *Hil.* 1690, one devised a lease to his daughter, and afterwards renewed the lease by changing the life, subsequent to which he annexed a codicil to his will, though without taking notice of the lease in such codicil. In this case, according to the book, it was left a question, whether the renewal of the lease was a revocation, or not, of the will, and the point is not there determined; but upon looking further into the case, and searching the Register's book, it appears to have been ruled by the court, that the codicil being annexed to the will, was a republication of the will, if the renewal of the lease had been a revocation.

Secus (as it seems) in the case of a lease for years.

Also in the case of *Adean* v. *Templar*, heard at the Rolls, the 15th of *June*, 1722. A man had five sons, and by his will gave a college lease to his second son, and having made a suitable provision by his will for all his other sons, bequeathed the surplus of his estate among all his five children, after which the testator renewed the college lease, and the eldest son brought his bill, as one of the residuary legatees, for his share of this college lease, supposing the devise of it to the second son to be revoked by the subsequent renewing thereof; and this being at that time solemnly debated, the Master of the Rolls held it a case of very great consequence, and that it might prove very inconvenient and an hardship, to construe that to be a revocation of the bequest, which in [169] all probability was intended for the benefit of the legatee; his Honour therefore ordered the Master to state the matter specially, and reserved costs; whereupon the eldest son was well advised, and proceeded no further in this cause, but permitted the second son [A] to enjoy the lease devised to him, notwithstanding the pretended revocation by the renewal; so that the authorities were rather for the plaintiff than against him.

But it was further urged, that if this renewal of the lease was a revocation in law, yet it would not be so in equity, but the renewed lease would be subject to a trust for the devisee; that accordingly, if a man devises lands in fee to *A.*, and af-

[A] This appears to have been the case of a lease for years, which, notwithstanding the doubt the court of *B. R.* seems to have been in, in the case of *Bunter* v. *Cook*, *Salk.* 237. whether it would pass by a will, made before the purchasing thereof, has been since clearly held to pass by such will. See the opinion of the Lord *Macclesfield*, in the case of *Wind* v. *Jekyll et Albone*, vol. 1. 575. where his Lordship also held, that no freehold estate can pass by such will, and why.

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terwards makes a mortgage thereof in fee; this mortgage in fee, though a revocation of the will in law, yet is none in equity, but the right of redemption shall still pass by the will: for that the conveyance by way of mortgage was only for a particular end, *(viz.)* to borrow money upon the estate, and to make a pledge for that purpose. So in the present case, the surrender of the old lease is in order only to procure a new one, though such new lease [B] is taken to the lessee and his heirs for the three lives. So if one that has articled to buy lands (*a*) should afterwards devise these lands, and then the person that has contracted to sell the lands to him should convey the same pursuant to the articles; this is no revocation in equity, but the equitable right, which the testator has to the land articled to be purchased, shall pass by the will, and the testator's heir at law be a trustee for the devisee.

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(*a*) 2 Vern. 679. Greenhill *v.* Greenhill.

By all which cases it was said sufficiently to appear, that a will may be revoked at law, and yet be subsisting in equity; so that taking it in the present case, that the renewal of the lease was a revocation at law, the same would not however

[B] *A.* and *B.* tenants in common of lands in fee. *A.* by will dated 25th of *January*, 1719, devised his moiety in fee; afterwards *A.* and *B.* made partition by deed, dated 16th of *May*, 1722, and fine, declaring the use, as to one moiety in severalty, to *A.* in fee; and as to the other moiety in severalty to *B.* in fee; on its being sent by the Lord Chancellor *King* to the Judges of the King's Bench to give their opinion, whether this was a revocation of the will? it appears by the Register's book, that the court, (*viz.*) Lord *Raymond*, Chief Justice; *Page*, *Probyn*, and *Lee*, Justices; certified,

"That they were all of opinion, that the will of the said *A.* was not revoked by "the deed and the fine levied in pursuance thereof; and that the said *A.*'s share "of the lands contained in the deed, and the fine levied thereon, did pass by the "will of the said *A.*" with which the Lord Chancellor concurred, and ordered that the several trusts in the said will of *A.* should be established. *Luther* v. *Kidby*, *April* 9, 1730. (*x*)(1) But if *A.* devises land and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this seems a revocation; because a fine operates as such from the return of the writ of covenant, and not from the caption. See *Salk.* 341. *Lloyd* v. *The Lord Say and Sele.* And yet this is a hard case, since by the caption the party conusor does all his part, and the rest is only the act of the clerk or his attorney, without any particular instructions from the party.

(1) And so, *Swift* v. *Roberts*, 3 Burr. 1490.

(*x*) See the comments on *Luther* v. *Kidby*, in *Goodtitle* v. *Otway*, 1 Bos. & Pul. 585., in *Harmood* v. *Oglander*, 6 Ves. 219., and in *Maundrell* v. *Maundrell*, 10 Ves. 256, 264.

operate as such in equity; and that this was still the stronger in that the testator by his will had directed, that the trustees' renewal of the lease should be a means made use of to continue and preserve the estate in the family.

But it was insisted on the other side, and so held and decreed by the Lord Chancellor, that this renewal of the lease for three lives was a revocation of the will as to this particular; for by the surrender of the old lease, the testator had put all out of him, had divested himself of the whole interest; so that, there being nothing left for the devise to work upon, the will must fall, and the new purchase being of a freehold descendible, could not pass by a will made before such purchase. But his Lordship wondered, that this case, which must have often happened, had not been before determined. (1)

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There was left one other point in the case, which was this: Sir *Henry Marwood*, in 1663, upon his marriage with *Dorothy* the daughter of *Allan Bellingham*, was to have 3000*l.* portion with his wife, and to lay out that sum in the purchase of land, to be settled on Sir *Henry* and his wife, and the heirs male of his body by her, remainder in tail male to the plaintiff's father. It appeared, that Sir *Henry* did lay out the 3000*l.* in the purchase of an estate called *Ascomb*, in *Yorkshire*, and afterwards suffered a common recovery thereof, having never made a settlement of it on the plaintiff's father in tail male, expectant on his own death without issue male by *Dorothy*.

A. covenants on his marriage to lay out 3000*l.* in the purchase of land, and to settle it on A. in tail, remainder to B.; A. purchases the manor of D. with this 3000*l.*, and never settles it, but suffers a recovery thereof; as the covenant was a lien on the land; so the recovery suffered of it discharges the lien, and bars B. of the benefit of the covenant, and of the remainder.

And the court held without difficulty, that when the *Ascomb* estate was purchased, and declared to be the land, which was to be appropriated and settled for the 3000*l.* portion; then, and from that time, there was a lien upon the land, and the plaintiff's father became entitled in equity to a remainder in tail male therein, expectant on the death of Sir *Henry* without issue male by his lady; and that, when Sir *Henry* afterwards suffered a recovery of the premises, such

(1) *Abney* v. *Miller*, 2 Atk. 597.; and so in chattel leases if specifically bequeathed, *Abney* v. *Miller*, ub. sup. *Carte* v. *Carte*, 3 Atk. 174. *Stirling* v. *Lydiard*, 3 Atk. 199. *Rudstone* v. *Anderson*, 2 Vez. 418. *Hone* v. *Medcraft*, 1 Bro. C. C. 261. *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291. (*x*)

(*x*) *James* v. *Dean*, 11 Ves. 383, 388. and 15 Ves 236. *Slatter* v. *Noton*, 16 Ves. 197. *Colegrave* v. *Manby*, 6 Mad. 72.

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recovery barred the trusts: and that it had lately been solemnly determined by this court, that a recovery would bar a trust. (*y*) Whereupon the plaintiff's bill was dismissed *in toto*, but without costs, the Lord Chancellor thinking it a very hard case.

(*y*) *Philips* v. *Brydges*, 3 Ves. 128.

29. Ch. D. 208.

Case 41.

WILSON *v.* SPENCER.

Lord Chancellor KING.

JOHN SPENCER, by his will dated the 31st of *March*, 1729, devised, that all his just debts and pecuniary legacies should be paid by his executor out of his personal estate, as far as the same would extend, and in default of that fund, by and out of his real estate; for which purpose he willed, that his executor, *within twelve months after his decease*, should levy and raise out of the personal estate, not otherwise specifically devised, and in default of such fund and in aid thereof, by and out of his real estate, or by mortgage or sale of such part thereof, as might be sufficient, the full and just sum of 1000*l.* which said sum of 1000*l.* he did thereby give and bequeath to his younger son, *Edward Spencer*, to be paid him by his executor immediately after the same should be raised as aforesaid. And the testator did thereby charge all his real estate with the said sum of 1000*l.* for the purpose aforesaid, and to answer the same in all events, in case the said testator's personal estate should prove deficient.

2 Eq. Ca. Ab. 547. pl. 25. One by his will devises, that all his debts and legacies shall be paid by his executor out of his personal estate, if that shall be sufficient; but if not, then that his executor, within twelve months after his death, shall sell or mortgage so much of his real estate, as shall be sufficient for that purpose, and (int' al') gives a legacy of 1000*l.* to J. S. who dies within a year, and the personal estate is not sufficient; this is a vested legacy, and shall be paid to the executor of the legatee, though charged upon land; for the words, within twelve months, denote the ultimate time, but the executors may pay the legacy sooner.

The personal estate was not sufficient to raise this 1000*l.*; and *Edward Spencer*, the legatee, died within the year, *(viz.)* eight months after the death of the testator. Whereupon the executor of *Edward Spencer*, the legatee, bringing a bill for the 1000*l.* the question was, whether the personal estate being deficient, and *Edward Spencer*, the legatee, dying within the year, this 1000*l.* legacy should not be deemed a lapsed legacy, and sink in the land, for the benefit of the heir at law?

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Against the payment of the legacy it was urged, to have been the constant rule of equity, ever since the case of *Paulet* v. *Paulet* (*a*), that if a legatee of a legacy charged upon land dies before the legacy becomes payable, the land or real estate shall not be loaded for the benefit of an executor or administrator, but the legacy shall sink in the land in favour of the heir; that in the principal case the legacy was no charge upon the land, until the end of twelve months; no bill could be brought for the raising of it before that time; and to call it a vested legacy would be begging the question, since a legacy given out of a real estate is not vested, until it becomes payable, and in case of the legatee's death before that time, shall never be paid, but sink in the land; and as to what might be objected, that this legacy was not made payable at a certain determinate future day, *(viz.)* at the end of twelve months, but only *within* twelve months; so that the executor was at liberty to pay it as soon as he pleased after the testator's death, but must not defer payment longer than that time: to this it might be answered, that the law, in this case, had appointed a time for payment, *(viz.)* the end of the twelve months after the testator's death; and that the legacy could not be said to be due, till the ultimate part of that time was come; like the case, where one seised in fee leases for years, rendering rent at *Lady-day* and *Michaelmas;* if the lessor dies on *Michaelmas-day*, yet, the rent not being due until the end of that day, *(viz.)* not before [C] twelve o'clock at night, on the lessor's dying before that time, it shall go to the heir, and not to the executor; that the words *within twelve months* are the same as, at or before the end of twelve months, and surely the 1000*l.* could not be said to be due or payable, until the end of the twelve months; so that the legatee dying before, the land is discharged. And for this purpose were cited the cases, in 2 *Vern.* 416, of *Yates* v. *Fettiplace*. 2 *Vern.* 617, *Carter* v. *Bletso, Duke of Chandos,* v. *Talbot,*(*a*) and that of *Whiddon* (1) v. *Oxenham*, 7th of *July*, 1731, at the Rolls.

(*a*) See 1 Vern. 204, 321.

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(*a*) Vol. 2. 610.

The Lord Chancellor admitted, that in all the former cases, wherein a portion was secured out of land payable to a

[C] If the lessor lives till sun-set, it becomes due to him, according to the case of *Southern* v. *Bellasis*, vol. 1. 178, 179, in the note.

(1) 2 Eq. Ca. Ab. 546. pl. 24.

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daughter at eighteen, or marriage, and the daughter died before that age, or marriage; it was highly reasonable the land should be eased of the charge, when the only motive and inducement for making the same was at an end and determined, by the daughter's dying under eighteen or unmarried; and consequently before she had any occasion for a portion; but that in the present case the legacies were all vested by the first words of the will, whereby the testator devised, that all his legacies should be paid by his executors out of the personal estate, if sufficient, or else out of his land; and that the subsequent direction, that they should be paid within twelve months after the testator's decease, was saying no more than a court of equity would say without these words, mere surplusage, and therefore could make no [175] alteration. His Lordship took notice of a case stronger to this purpose, than any that had been cited, which is in (a) See also Pre. Cha. 109. 2 *Vern.* 424, *Jackson* v. *Farrant*, (a) where a man by his will devised 500*l.* portion to his daughter, to be paid by his executor, at her age of twenty-one, out of his personal estate, and the rents and profits of his lands; and if not raised by that time, that his executor should stand seised of the land, and take the rents thereof, until the 500*l.* should be raised and paid. The daughter married at eighteen, and died before twenty-one. Whereupon it was objected, that the portion should sink, because the daughter died before twenty-one. Or that, if it was to be raised, still it should be only by the rents and profits, and not by a sale. But it was decreed, that the portion should be raised together with the interest and costs, and by a sale too, wherein the defendant, the heir, was forthwith to join; and this, although the incumbrances were so great, that the whole inheritance would produce little more than the 500*l.* Wherefore it was decreed in the principal case, that the legacy should be raised with interest from the end of the year; and the land being devised to *A.* for life only, remainder to *B.* in fee; the court would not direct the legacy to be raised (1) out of the annual profits, for that might wholly defeat the estate for life; but that the tenant for life should only keep down the interest, and that the 1000*l.* should be raised by a sale of so much as would be sufficient to pay the same with interest and costs. (2)

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(1) Vide *Manaton* v. *Manaton*, ante, 2 vol. 234.

(2) Reg. Lib. B. 1732. fol. 217.

Note. The Master of the Rolls was present in court, when this cause was heard; and, on being spoke to by the Lord Chancellor, declared himself of the same opinion. (1)

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(1) Vide Duke of *Chandos* v. *Talbot*, ante, 2 vol. 612. and *Cowper* v. *Scott*, ante, 119.

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Case 42.
Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 365. pl. 22. Devise to my daughters, until my son shall attain his age of forty years, hoping by that time my son will have seen his folly. The son dies before forty; the devise to the daughters ceases. Devise to A. until B. shall attain forty years. B. dies before forty; A.'s estate ceases. Secus, if the devise to A. be made a fund to pay debts or portions, which cannot be raised, until B. shall have attained his age of forty; in which case the word "shall" is taken for "should."

MR. LOMAX, late of *St. Albans*, in *Hertfordshire*, the plaintiff's grandfather, by his will devised all his lands and tenements to a trustee, (one Mr. *Graves Norton)* and his heirs, to the use of the testator's wife for her life, she paying 200*l. per annum* to his the testator's son, *Caleb Lomax*, until his age of forty years; and in case the wife should die before the said *Caleb* should attain to the said age of forty years, then to his (the testator's) daughters, and to their heirs, they paying unto the said *Caleb* 200*l. per annum*, until his age of forty years: the testator hoping that his son *Caleb* would by that time have lived to see his folly. After which the testator devised the premises to his son *Caleb* for life, remainder to trustees and their heirs during the life of *Caleb*, in trust to support the contingent remainders, and from and after the death of *Caleb* then to the use of the first son of *Caleb*, and the heirs male of his body, with remainder to the second, third, fourth, and fifth sons of *Caleb* successively, remainders over.

The testator died, the wife also died. *Caleb* married, and had a son (the plaintiff) but died before his age of forty years. And the bill being *(inter al')* for an account of the profits of the premises from the death of *Caleb*, the plaintiff's father, the question was, whether this estate devised by the will to the testator's daughters, until his son *Caleb* should attain to the age of forty years, should subsist, now *Caleb* was dead, until such time as he should, had he lived, have attained to his age of forty; or whether it determined by the death of *Caleb* before he arrived to that period?

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It was argued for the defendants, the daughters of the testator, that this devise did create an absolute title and interest unto them, until such time as their brother should have

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attained his age of forty years, had he lived so long: and for this were cited 2 *Vern.* 35. *Gosley* v. *Gifford*, but more particularly *Lane* 58. and 3 *Co.* 19. *Boraston's* case.

But the Master of the Rolls, after time taken to consider of it, and having mentioned and distinguished upon the cases that had been cited, decreed, that this estate, devised to the testator's daughters and their heirs, until his son should come to the age of forty years, did determine on his dying under that age; and that, agreeably to all common sense and reason, the term and interest thus devised must cease, when it became impossible for *Caleb* to arrive at that age. For, taking it literally, that the daughters should enjoy the land until *Caleb* should attain to his age of forty, this would be to make them hold it for ever: in regard *Caleb*, when he died before forty, could never afterwards attain to that age; that it is very true, where such an estate or interest, as in the principal case, is created for a particular purpose, as for a fund, suppose, for payment of debts, (which was the case of *Boraston*, 3 *Co.*) there, since the son might happen to die the next day, or soon after the testator, it would be very hard that such an event, occasioned purely by the act of God, should defeat the fund provided on purpose for the benefit of creditors: and therefore in aid of the honest intention of the party, who may be supposed to have computed the time wherein the profits of his estate would be sufficient for that
[178] end, in such case the judges, by a liberal interpretation, have construed the devisor to have meant, that the devisee or executor should have the land for so long time as the son, if he had lived, should have arrived at the age mentioned: but that in all cases where no such intention appears, the estate or interest would absolutely determine by the death of the party under the age specified in the will. That such construction seemed the more just in the present case, as the reason appeared why the testator created this interest by his will, until his son should attain to his age of forty years, namely, in order to guard the estate against the ill-conduct and extravagancy of his son, the will saying, the testator "hoped by that time his son would have seen his folly:" but his son dying before that time, the testator's estate could not afterwards suffer, through any folly or extravagance of the said *Caleb*. Again, the will having given the estate, from and after the death of *Caleb*, to his [the said *Caleb's*] son, there could be no reason assigned why such son should

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be kept out of the estate until his father should, had he lived, have attained to forty; for by such construction the son would be punished, not for any fault of his own, but only for the extravagance of his father: and it cannot reasonably be intended, that the testator meant to disinherit his heir at law, without any offence committed by him. (*x*)

Another question in the case was, that the devise was to the first son of the testator's son *Caleb*, and the heirs male of his body, with remainder to the use of the second, third, fourth, and fifth sons of *Caleb* successively, without saying *for what estate*, (the words * of inheritance being by mistake omitted) and there was a son of *Caleb* born before, but such first son died very young, after which this son, the plaintiff, was born.

Devise to my son A. for life, remainder to his first son in tail male, remainder to his second, third, fourth, and fifth sons successively, without saying for what estate, or any words tantamount. A. has two sons, the former of whom dies in his life-time; the second son shall have an estate tail, being the first son at his father's death. Quære.

[*179]

And the court held, that this son, the plaintiff, being the first son (*y*) at his father's death, was entitled to take an estate tail. For which was cited the case of *Trafford* v. *Ashton*, [E] 2 *Vern.* 660. However, this point, as it seems, could not now come in question; for that the plaintiff would, in all events, be entitled to the premises for his life. (1)

[E] *Quære autem.* For the reason of that case seems rather against this construction, which is, at least, better warranted by the case of *Chadwick* v. *Doleman*, in the same book, fol. 528.

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(1) Reg. Lib. B. 1732. fol. 184. It was afterwards decided by Lord *Hardwicke*, that the plaintiff took an estate tail as first son of *Caleb*, 1 Vez. 290. Et vide *Evans* v. *Astley*, 3 Burr. 1570. (*z*).

(*x*) *Mansfield* v. *Mansfield*, 8 Vin. Ab. 291. Pl. 13. S. C. 1 Eq. Ca. Ab. 195. Pl. 4.

(*y*) *West* v. *The Lord Primate of Ireland*, 3 Bro. C. C. 148.

(*z*) S. C. 1 Black. Rep. 499.

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TERM. PASCHÆ, 1733.

Vol. 539.

Case 43.

CROFT *v.* PYKE.

Lord Chancellor KING.
2 Eq. Ca. Ab. 397. pl. 12. 462. pl. 18.

A BILL was brought by *Grace* the widow of *Francis Croft*, for the recovery of the sum of 1000*l.* secured by a bond entered into by the said *Francis Croft* on his marriage with the said *Grace*, unto her trustee, for securing 1000*l.* to the said *Grace*, in case she should survive her then intended husband.

Francis Croft was partner with Sir *Francis Forbes* in the trade of a cotton merchant. The stock was 4000*l.* of which each had a moiety, *(viz.)* 2000*l.* It appeared that after the marriage, the said *Francis Croft* took out of the partnership stock more than the sum of 2000*l.* which was his share. After which *Croft* died, leaving his partner Sir *Francis Forbes*, and *Thomas Archer*, Esq. executors, in trust for his wife and only child. On the death of *Croft*, Sir *Francis* his partner, intermeddled with his personal estate, and buried
[181] the said *Croft;* and there was a debt due from the said *Croft* to the said Sir *Francis* by bond for 300*l.*; but Sir *Francis* died before he had proved the will of his testator *Croft*, and left the defendant *Pyke* executor. *Thomas Archer* renounced. Afterwards *Grace Croft* the widow died, and left her father *Thomas Brampston* executor, in trust for her child, whom she made residuary legatee. The child brought the present bill, in nature of a bill of revivor, for the recovery of this 1000*l.* as belonging to him under his mother's will.

The child's grandfather, *Thomas Brampston*, who was executor in trust of the mother's will, was examined as a witness in the cause, to prove there was a fraud committed by Sir *Francis Forbes*, in representing the said *Francis Croft* to have been his partner in a moiety of the said 4000*l.* stock: whereas at that time he was partner only for a third; and afterwards was to have been admitted as a partner for a

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moiety, upon his the said *Croft's* paying to the said Sir *Francis* 1000*l.*, part of his said wife's portion.

And it was insisted, that this *Thomas Brampston* was no good witness, because he was executor, and though but executor in trust for the infant plaintiff, and notwithstanding his evidence did not tend to increase the assets for his own benefit, but for the benefit of the infant; yet an executor cannot be said to be a disinterested person, being suable for the debt, and liable to pay costs; and consequently differing from the case of a common trustee, (1) for which reason the Lord Chancellor would not admit him to be heard as a witness. [But note; the said *Thomas Brampston* should have renounced the executorship, and have let another take out administration with the will annexed, upon which he might have been a witness.]

A bare trustee is a good witness for his *cestui que trust;* but not an executor in trust, as he is liable to be sued by creditors, and to answer costs.

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The next question was, with regard to the manner of accounting, and touching the allowances on the account; it being urged, that the bond given by the said *Croft*, in trust for his wife, was a debt by specialty, and given on a valuable consideration, namely, that of marriage and a marriage portion; whereas the embezzlement of the stock by *Croft* could be only a debt by simple contract.

On the other side it was said, if the plaintiff desired satisfaction of the bond in question out of the separate estate of the said *Croft* the husband; he must indeed in that respect be preferred to any simple contract creditors: but if satisfaction was sought out of the partnership stock, all the partnership debts must be first paid. And in the present case, the fact being (as was alleged) that the said *Croft*, the husband, had taken out of the stock 2000*l.* and upwards, he had no stock left. And there could be no colour of reason, that *Croft*'s debt being by bond, or even had it been by judgment, should be paid out of Sir *Francis Forbes*'s moiety of the stock; and for this was cited 2 *Vern.* 293, 706. (*a*) that the copartnership debts (*b*) are to be first paid out of

A. and B. are partners in trade, A. gives a bond to leave his wife 1000*l.* A. dies, the other partner administers. If the wife would be paid out of the separate estate of A. on there being effects, she shall have a preference before other creditors: but if there is no separate estate, and the wife would have satisfaction out of the partnership effects, then all thepartnership debts must be first paid.

(*a*) Vol. 2. 500. Exparte Crowder.

(*b*) Ante 25. Horsey's case, and post 405. Ex parte Rowlandson.

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(1) Vide *Goss* v. *Tracy*, ante, 1 vol. 290. *Man* v. *Ward*, 2 Atk. 229. *Mabank* v. *Metcalfe*, 3 Atk. 95. *Dixon* v. *Parker*, 2 Vez. 219. *Fotherby* v. *Pate*, 3 Atk. 604. *Goodtitle* v. *Welford*, Doug. 140. (*x*)

(*x*) *Bellew* v. *Russel*, 1 Ba. and Be. 96. *Mulvaey* v. *Dillon*, 1 Ba. and Be. 409. *Hurst* v. *Beach*, 5 Mad. 353.

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the partnership stock, (in case one of the partners becomes bankrupt) and afterwards the separate debts.

And of this opinion was the Lord Chancellor, who decreed, that it should go to an account, to see what the testator *Francis Croft*, the partner, owed to the (1) partnership; and after those debts were paid, if there should remain any surplus in his share of the stock, then that to be liable to answer the bond due from *Croft* to the trustee of the wife.

A. dies indebted by one bond to B. and by another bond to C. and leaves B. and J. S. executors. B. intermeddles with the goods, and dies before probate, and before any election made to retain; Qu. Whether, as B. might have retained the goods in his hands, his executors have not the same power?

Thirdly, It appearing that *Francis Croft*, the deceased partner, was indebted to Sir *Francis Forbes* in one bond of 300*l*. It was insisted that, as Sir *Francis* had the power of retaining that bond out of the assets, so the same being in his hands, it amounted to a retainer, and consequently that bond ought to be allowed in the account before the bond claimed by the plaintiff. (2)

To which it was answered; that notwithstanding Sir *Francis Forbes* was appointed one of the executors of the said *Francis Croft*, yet he never proved the will, and dying before probate, could not retain, especially as he had never signified any election, that he would retain for the said bond.

Though it was replied by the other side, that since an executor may assign, release, and do every thing but declare before probate, even as to the courts of law; there was the same reason for his being able to retain before probate; and though in the principal case he had not expressly declared whether he would retain or not; yet it was plain he had goods of his testator's in his hands, had intermeddled therewith, and out of part thereof had buried the testator, and after such intermeddling (*c*) could not have renounced the executorship. But the counsel for the defendant, the executor

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(*c*) Salk. 307.

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(1) *West* v. *Skip*, 1 Vez. 242, 456. (*y*) *Smith* v. *De Sylva*, Cowp. 471. *Goss* v. *Dufresnoy*, Cooke's Bank. Law, 497. (*w*)

(2) See the observation made on this part of the case by *Burnet*, J. in *Ryall* v. *Rolle*, 1 Atk. 173. (*z*)

(*y*) S. C. by name of *Skip* v. *Harwood*, 2 Swan. 586.

(*w*) S. C. 2 Eq. Ab. 110. pl. 5. and see *Taylor* v. *Fields*, 4 Ves. 396. 15 Ves. 559. *Barker* v. *Goodair*, 11 Ves. 78. *Ex parte King*, 17 Ves. 115. S. C. 1 Rose 212. *Ex parte Reid*, 2 Rose 84.

(*z*) S. C. 1 Vez. Sen. 348.

of Sir *Francis Forbes*, waiving this point of the 300*l.* bond, the court gave no opinion touching the same. [B]

CROFT *v.* PYKE.

[B] *A.* lent money on bond to *B.*, who dying intestate, C. took out administration to him; after which *C.* dying, *A.* took out administration *de bonis non*, *&c.* to *B.*; and it was determined, (*inter al'*) that *A.* might out of the assets of *B.* retain for such bond debt contracted before he took out administration; and though *A.* happened to die before he had made any election in what particular effects he would have the property altered; yet the court said, it must be presumed he would elect to have his own debt paid first; and this being presumed, there would remain no difficulty as to altering the property; for as the executors of *A.* were to account for the assets of *B.*, they must on the account deduct the amount of the money lent by *A.* to *B.* *Weeks* v. *Gore*, at the Rolls, *Mich.* 1720.

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TERM. S. TRINITATIS, 1733.

22. Ch. D. 374.

Case 44.

GODFREY *v.* FURZO.

Lord Chancellor KING. If I send goods to B. from beyond sea to the use of B., and before these goods are paid for B. dies insolvent, I cannot have my goods again: but if I send goods to a factor to dispose of to my use, and he becomes a bankrupt; these goods are not liable to the debts of such bankrupt.

A MERCHANT beyond sea, (*viz.*) at *Bilboa* in *Spain*, sent goods from thence to *B.* a merchant in *London*, for the use of *B.*, and drew bills on *B.* for the money. The goods arrived at *London*, which *B.* received, but did not pay the bills, and died insolvent. Upon which the merchant beyond sea brought a bill against the executor of the merchant in *London*, praying that these goods might be accounted for to him, and insisting, that he had a lien on them, until paid; and that it would be extremely unreasonable, that his goods, while unpaid for, should be liable to satisfy other people's demands. And the case of one *Clare* was cited, as lately decreed by the Lord Chancellor, where a merchant beyond sea consigned goods to a merchant in *London*, to the merchant in *London's* own use, and drew bills on the merchant in *London*, who, having received the goods, became a bankrupt; yet it was held, that these goods, which were not paid for, should not be liable to the creditors of the bankrupt.

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A tradesman in London, by order of a tradesman in the country, sends goods to the latter, who does not appoint or name the carrier; afterwards the carrier embezzles the goods, the trader in the country must stand to the loss.

On the other hand the Attorney-General urged, that on delivery of the goods to the master of the ship beyond sea, in order to be sent to *England*, the property immediately became vested in the merchant in *London*, who was to run the risk of the voyage; and Mr. *Willes* compared it to the case of a tradesman in *London*, by order of a tradesman in the country, sending goods to the latter; in which case, though the country trader does not appoint or name the carrier, who afterwards embezzles the goods, the trader in the country must stand to the loss, (*w*) as had been determined by the Lord Chief Justice *Eyre* at *Shrewsbury* assizes.

(*w*) *Dawes* v. *Peck*, 8 T. R. 330. *Dutton* v. *Solomonson*, 3 Bos. and P. 582.

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Lord Chancellor. Were the law to be otherwise in the instance that has been mentioned, it would create the utmost difficulty in dealing. *A fortiori*, where a trader in *London* sends goods to a trader in the country, who *receives* them, and does not pay for them, the property must in that case vest in the trader in the country. As for the case of *Clare*, I do not well enough remember all the particulars of it; but probably there were circumstances of compassion therein, which might weigh with the court. When a merchant beyond sea consigns goods to a merchant in *London*, on account of the latter, and draws bills on him for such goods; though the money is not paid, yet the property of the goods vests in the merchant in *London*, who is credited for them, and consequently they are (1) liable to his debts. But where a merchant beyond sea consigns goods to a factor in *London*, who receives them, the factor in this case being only a servant or agent for the merchant beyond sea, can have no property in such goods (*y*); neither will they be affected by (2) his bankruptcy: and the Lord Chancellor said, he had discoursed [187] with merchants about the matter, who held this to be the practice amongst them; and therefore in the principal case the court denied granting an injunction to stay the executors of the merchant in *London*, from disposing of the goods. [A]

[A] A trader in *London* having money of *J. S.* (who resided in *Holland*) in his hands, bought *South-sea* stock, as factor for *J. S.* and took the stock in his own name, but entered it in his account book, as bought for *J. S.* after which the trader became bankrupt. Determined, that the trust stock was not liable to the bankruptcy. By the Lord *Parker*, who said it would lessen the credit of the nation to make such a construction. *Ex parte Chion*, *Trinity*, 1721.

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(1) Vide *Snee* v. *Prescot*, 1 Atk. 245. *D'Aquila* v. *Lambert*, Amb. 399. *Lickbarrow* v. *Mason*, 2 T. R. 63, and 1 H. Black. 357, (*x*) and the several cases there cited. *Kinloch* v. *Craig*, 3 T. R. 119, 783.

(2) Ex parte *Dumas*, 2 Vez. 586. 1 Atk. 232. S. C. *Mace* v. *Cadell*, Cowp. 233. Et vide *Copeman* v. *Gallant*, ante, 1 vol. 314.(*z*)

(*x*) 5 T. R. 367, 683., and 6 East 20, n. (*a*).

(*y*) *Newsome* v. *Thornton*, 6 East 17. *Ex parte Pease*, 19 Ves. 44.

(*z*) *Zinck* v. *Walker*, 2 Black. Rep. 1154. *Hassall* v. *Smithers*, 12 Ves. 119. *Bolton* v. *Puller*, 1 Bos. & Pul. 539. *Giles* v. *Perkins*, 9 East 12. *Taylor* v. *Plumer*, 3 M. & S. 562. 2 Rose 457. *Ex parte Pease*, 19 Ves. 25. 1 Rose 232. *Ex parte Peyron*, 2 Rose 366. *Ex parte Aiken*, 2 Mad. 192. *Ex parte Smith*, Buck. 355. *Thompson* v. *Giles*, 2 B. & C. 422.

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Case 45.

HALL *v.* HARDY.

Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 28. pl. 35. Bill lies to compel a specific performance of an award to convey an estate, where the party submitting has received the money in consideration whereof he is to convey the estate sued for.

UPON a bill brought to compel the defendant to make a specific performance of an award, the case was thus: the plaintiff and defendant were brother and sister, between whom there was a dispute touching the fee-simple of a small parcel of land under their father's will; and the plaintiff and defendant entered into a bond in the penalty of 200*l.* to stand to the award of arbitrators touching this matter. The arbitrators made an award, that the plaintiff should pay 10*l.* to the defendant at such a day, and 30*l.* to the defendant at another day; and that thereupon the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premises to the plaintiff and her heirs. The plaintiff paid the defendant the 10*l.* which the defendant accepted upon the day on which it was awarded to be paid; afterwards the plaintiff tendered the remaining 30*l.* on the day on which that was awarded to be paid, and the defendant was willing to take the money, but would not execute the [188] fine and deed of uses. Wherefore the plaintiff brought this bill to compel the defendant to a specific performance of the award.

Upon opening the cause, the Master of the Rolls said, he thought this a strange bill; for which he knew no precedent, and that the plaintiff must sue his bond.

Whereupon I urged, that the plaintiff had actually paid the 10*l.* according to the award, and the defendant accepted it, and thereby undertaken to perform the award; that if this suit were not to be allowed, the plaintiff would have no remedy to get back the money paid by her to the defendant; that in 2 *Vern.* 24, *Norton* v. *Mascall*,(*x*) the court decreed a specific performance of an award, though in that case it was not executed, and in strictness of law void.

To which his Honour replied, that because the award was not good in law, therefore in the case cited there might be reason to decree a specific performance. However, the court desiring to know what the counsel for the defendant had to

(*x*) S. C. 2 Cha. Rep. 157. 3d Edit. v. *Bishop*, 1 Cha. Rep. 75. and see *Scott* v. *Wray*, 1 Cha. Rep. 45. *Bishop* *Wood* v. *Griffith*, 1 Swan. 54.

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say, as to the defendant's having accepted part of the money; it was insisted on his behalf to be sufficient, that there was (unless in very particular circumstances) no instance of a bill being brought for a specific performance of an award. Besides, that this was an unreasonable award, *(viz.)* that the husband should procure his wife to join with him in a fine, which it might not be in his power to do; and therefore the court would not oblige him to it. Also the wife's joining ought to be free, and not by the compulsion of her husband; that the plaintiff had a plain, proper and natural remedy, which was, to sue the bond, whereon the penalty would be recovered; and even as to the money which had been paid, if the defendant would not perform the award by procuring his wife to join with him in a fine, the plaintiff might recover it back, as received to the plaintiff's use.

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Master of the Rolls. There have been a hundred precedents, where, if the husband for a valuable consideration covenants, that the wife shall join with him in a fine, the court has decreed [B] the husband to do it, for that he has undertaken it, and must lie by it, if he does not perform it. The money paid in pursuance of the award cannot be said to have been paid by the plaintiff to the use of the plaintiff herself; and the precedent in Mr. *Vernon* shews, that this court has decreed a specific performance of an award, which is more especially reasonable in the present case, where the plaintiff has paid, and the defendant accepted, part of the money awarded; for by this acceptance the defendant has

Where the husband for a valuable consideration covenants that his wife shall join with him in a fine; this court will enforce a performance of such covenant.

[B] Because in all these cases it is to be presumed, that the husband, where he covenants, that his wife shall levy a fine, has first gained her consent for that purpose. So said by the Master of the Rolls, in the case of *Winter* v. *D'Evreux*, *Trinity*, 1723; and that the interest in such covenant has been taken to be an inheritance descending to the heir of the covenantee. But, after all, if it can be made appear to have been impossible for the husband to procure the concurrence of his wife, (as suppose there are differences between them) surely the court would not decree an impossibility, especially where the husband offers to return all the money, with interest and costs, and to answer all the damages. (*x*)

(*x*) This point has been much discussed. *Barrington* v. *Horne*, 2 Eq. Ca. Ab. 17. Pl. 7. *Sedgwick* v. *Hargrave*, 2 Vez. Sen. 57. *Withers* v. *Pinchard*, cited 7 Ves. 475. and *Morris* v. *Stephenson*, 7 Ves. 474. are cases where the husband has been decreed to procure the wife to join; and *Ortread* v. *Round*, 4 Vin. Ab. 203. Pl. 4. *Emery* v. *Wase*, 5 Ves. 846, and S. C. on appeal, 8 Ves. 505. are cases where a decree to that effect has been refused. And the dicta in more recent cases support those decisions, *Davis* v *Jones*, 1 N. R. 267. *Howel* v. *George*, 1 Mad. 6. *Martin* v. *Mitchell*, 2 J. & W. 425.

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undertaken to perform the award, has consented to it, and made it his own agreement for a valuable consideration, *(viz.)* the money paid him. Wherefore, take a decree for the defendant's performance of the award, upon the payment of the residue of the money awarded, and let him pay costs, it being a defence against conscience to take the money awarded, and yet refuse to perform his part of the award.

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Difference between awards to pay money, and to do any thing collateral; and why a bill in equity may be proper only to compel a performance of the latter.

Note. These decrees may not have been usual, because awards are commonly to pay money; in which cases a bill in equity to compel a performance is improper: but where the award is to do any thing in specie, as to convey an estate, &c. in such case, if the defendant has accepted the money awarded him in satisfaction of the conveyance, it is highly reasonable, that he should make the conveyance; the rather, for that if the plaintiff had sued the bond at law, the defendant would have been relievable by bill in equity against the penalty of the bond, upon a *quantum damnificatus*. So that such a decree, as in the principal case, prevents a suit in equity. (1)

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(1) Reg. Lib. A. 1732. fol. 554.

Case 46.

COLTON *v.* WILSON ET AL'.

Lord Chancellor KING.

2 Eq. Ca. Ab. 680, pl. 10. One articles to buy land, and the title is under a will not proved in equity against the heir; yet in some cases equity will compel the purchaser to accept the title.

THE defendant, Mr. *Wilson*, was a counsel of note at *Leeds* in *Yorkshire*, and had articled to purchase an estate in *Yorkshire*, for 4700*l*. The articles were dated the 20th of *February*, 1724, and this bill was to compel him to complete his purchase, and pay his purchase money.

The case was thus: This was part of the estate of *Henry Taylor*, who had no issue, but had two brothers, *George* and *Hugh Taylor*; the said *Henry Taylor* had mortgaged the premises for a considerable sum, amounting to near as much as the purchase money, and owing other debts, he made his will, dated the 20th of *February*, 1722, thereby devising all his real estate to his youngest brother, *Hugh Taylor*, and his brother-in-law, (one *Reresby)* and their heirs, in trust to sell, and pay his debts and legacies; and what remained after debts and legacies, was to go, by the will, to the testator's

next brother and heir, *George Taylor*, who was beyond sea, in the service of the *East India* Company. Soon after the testator died. *Hugh Taylor*, the testator's youngest brother, and one of the trustees in the will, alone covenanted by articles dated as above, with the defendant *Wilson*, to sell part of the trust estate to the defendant *Wilson* for 4700*l.*, and to convey the same to *Wilson* at his request, who covenanted to pay interest for the purchase money from *Lady-day* then next. The creditors of the testator, *Henry Taylor*, bring their bill against the defendant, *Wilson*, to compel him to complete his purchase, and to pay his purchase money, to the end they might be satisfied their debts.

The defendant *Wilson* said, he believed *Henry Taylor*, the testator, did duly execute his will, and devise the premises to be sold, and admitted the articles, and that he was ready to proceed in his purchase, *all proper parties joining*. The will was proved in this court to be duly executed: but the heir who was beyond sea, in the *East India* company's service, though made a party-defendant, yet had not appeared to, or answered, the bill; and the defendant *Wilson*, though he was at first willing to purchase the premises, and had entered on good part thereof; yet other part of this estate, on which he had not entered, being much out of repair, the tenants racked, and the rents likely to fall, he was now desirous of being discharged from his purchase.

And it was on his behalf insisted, that this being in the case of a will not proved in equity against the heir, it was a defective title (*x*); that none of the witnesses, that had been examined for the will, could be read against the heir, who in this case was probably adversary, and offended by the will; or else it might be reasonably presumed, that he would, though beyond sea, have been prevailed on to put in his answer to the bill: but that the heir might watch for an opportunity till the witnesses to the will should be dead, when he would contest the will; and though the defendant had said in his answer, that he was willing to proceed in the purchase, yet it was upon terms, that all proper parties should join, one of which proper parties was the heir at law; and that it would be a difficulty on the court to compel an

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(*x*) See Sugden's Vend. and Purch. 308. 5th ed. *Morrison* v. *Arnold*, 19 Ves. 673.

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unwilling purchaser to accept of a purchase, if there were any colour of objection to the title.(1)

Though it be proper to prove a will of lands in equity, yet the same is not absolutely necessary, any more than it is to prove a deed in equity.

Lord Chancellor: It is very proper that a will disposing of lands should be proved in equity, especially in the case of a modern will. But I cannot say this is absolutely necessary to make out the title, any more than it would be to prove a deed in equity, by which the estate is settled from the heir at law, after the ancestor's death. The will prevents and breaks the descent to the heir, as much as a deed, and the hands of the witnesses to the will may be as well proved as those to a deed; and it is the better, if in the indorsement to the will it is mentioned, that the will is attested by three witnesses, who subscribed their names in the presence of the testator.

Now, as it would be no objection to a title, if a modern deed, on which the title depended, was not proved in equity, why should it be so in the case of a will, where the same appears to be duly attested by three witnesses, whose names are mentioned to have been subscribed in the presence of the testator? But in the present case it appears the defendant, who articled for the purchase, knew at that time that the

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heir was beyond sea, and still accepted the title, without insisting that the heir should join, or that the will should be proved against the heir. Also the defendant admits by his answer, that the will was duly executed; and, by entering upon great part of the estate, has himself executed the purchase; for which reason let him pay the rest of the purchase money, with interest, according to the articles, and at the same time let the trustees and mortgagees join in proper conveyances to the defendant the purchaser.(2)

It seems in this case to have been a great help to the title,

(1) So, *Marlow* v. *Smith*, ante, 2 vol. 201. *Shapland* v. *Smith*, 1 Bro. C. C. 75. *Cooper* v. *Denne*, 1 Ves. jun. 565.(*y*)

(2) Reg. Lib. A. 1732. fol. 574. by the name of *Colton* v. *Rousby*, so decreed on a rehearing, the former decree having discharged *Wilson* from his purchase.

(*y*) S. C. 4 Bro. C. C. 80. *Mitchell* v. *Neal*, 2 Vez. Sen. 679. *Sheffield* v. *Lord Mulgrave*, 2 Ves. Jun. 526. *Crewe* v. *Dicken*, 4 Ves. 97. *Rose* v. *Calland*, 5 Ves. 186. *Roake* v. *Kidd*, 5 Ves. 647. *Vancouver* v. *Bliss*, 11 Ves. 465. *Lowes* v. *Lush*, 14 Ves. 547. *Stapylton* v. *Scott*, 16 Ves. 272. *Wheate* v. *Hall*, 17 Ves. 80. *Sloper* v. *Fish*, 2 V. & B. 145. *Eyton* v. *Dicken*, 4 Price, 303. *Hartley* v. *Smith*, Buck. 368. *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 568. *Marshall* v. *Bousfield*, 2 Mad. 175. Sed vide *Biscoe* v. *Perkins*, 1 V. & B. 493.

that the mortgage made by the testator, and prior to the will, was for the greatest part of the purchase money, which must be kept on foot for the protection of the title.

COLTON v. WILSON.

Mich. Hen. 4 & 5.
— 687.

ROGERS *v.* ROGERS.

Case 47.

ONE made his will, and thereby gave 5*l.* to his brother, (who was his heir at law) and made and constituted *his dearly beloved wife* his sole heiress and executrix of all his lands, and real and personal estate, to sell and dispose thereof at her pleasure, and to pay his debts and legacies. The question was, whether the wife was a trustee for the heir at law, as to the surplus of the real estate, after the payment of the testator's debts and legacies ?

Lord Chancellor KING.
Sel. Ca. in Cha. 81.
Ca. temp. Tal. 269.
2 Eq. Ca. Ab. 304. pl. 26.
One makes his wife his sole heiress and executrix of all his real and personal estate, to sell and dispose thereof at her pleasure, to pay his debts and legacies, and gives his brother (who was his next of kin and heir) 5*l.*, the wife has the residue to her own use, and not as a trustee.

After great debate by counsel on both sides, the Lord Chancellor decreed, that the testator's wife was entitled to the premises devised, for her own benefit, and that there was no resulting trust to the heir at law of the testator (*x*); that the case of *North* v. *Crompton*, 1 *Chan. Rep.* 196. was in point; that the devise that the wife should be sole heiress of the real estate, did in every respect place her in the (*a*) stead of the heir, and not as a trustee for him; that it was the plainer, by reason of the language of tenderness and affection, *his dearly beloved wife*, which must intend to her something beneficial, and not what would be a trouble only. And what made it still stronger was, that the heir was not forgot, but had a legacy of 5*l.* left him.(1)

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(*a*) Nov. 48. Hob. 34. Sty. 308.

Memorandum: On the other side was cited the case of the *Countess of Bristol* v. *Hungerford*, 2 *Vern.* 645. where one devised his real estate to be sold for the payment of his debts; and the surplus, if any, to be deemed personal estate, and to go to his executors, to whom he gave 20*l.* a-piece. Decreed the surplus a trust for the heirs at law. But the

(1) Reg. Lib. B. 1732. fol. 330.

(*x*) *Hill* v. *Bishop of London*, 1 Atk. 618. *Walton* v. *Walton*, 14 Ves. 322.

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court thought this a [C] strange determination, and to go much too far.

[C] This may well be thought a strange determination; and the rather, for that Mr. *Vernon* says, it was affirmed in parliament. The case is differently reported in the book intitled *Precedents in Chancery*, (*p.* 81.) where it is said, the surplus was decreed a trust in the executors, subject to distribution. And this is warranted by the Register's book. The decree appears to bear date 3 *July*, 1697, and to have been made by Sir *John Trevor*, the [then] Master of the Rolls. The words whereof are as follow: "And as to the surplus of the "said estate, after the debts and legacies paid, his Honour, having been at- "tended with the will, and having considered thereof, declared, that the said "testator having by his said will given to each of his executors 100*l.* a-piece,(*y*) "there is a resulting trust in them for the benefit of the representatives of the "said testator; and that the defendants Mrs. *Reppington* and Mrs. *Meredith*, "who were co-heirs and representatives of the said testator, Sir *William* "*Basset*, were well entitled thereto; and doth therefore order and decree, that "the residue and surplus of Sir *William Basset*'s estate, his debts and legacies "being paid as aforesaid, be equally distributed between them." It further appears by a subsequent order of the 18th of *November*, 1708, in the above-mentioned cause, that this part of the decree was affirmed in parliament, for it recites, that the decree of the 3d of *July* had been signed and enrolled, and that the judgment creditors appealed to the lords in parliament, who on the 26th of *February*, 1703, adjudged, (2) that the decree, so far as it had been executed, should not be set aside or opened: but that, as to the money remaining undivided pursuant to the decree, the appellants were to be let into a satisfaction of their debts, according to the priority of their several securities.—After which the order proceeds to give some directions in regard to the creditors. It is obvious to perceive that the same persons being heirs and likewise next of kin, (though they took only in the latter capacity) occasioned this mistake in Mr. *Vernon*'s Report of the case.

(2) 1 Bro. P. C. 66.

(*y*) See *Petit* v. *Smith*, ante, 1 vol. 7.

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Case 48.

THOMPSON's Case.

Lord Chancellor KING.

THIS cause being at issue, a commission was granted to examine witnesses at *Algiers*, in *Africa*, where (among others) two witnesses were examined for the plaintiff. But it fell out that before the execution of the commission, the plaintiff died, but neither the commissioners nor witnesses had any notice of the plaintiff's death. And one of the witnesses thus examined was dead, the other was living. The

2 Eq. Ca. Ab. 419. pl. 12. A commission being granted to examine witnesses at Algiers, the plaintiff died, by which, in strictness, the suit abated, but the witnesses were examined there before notice of the plaintiff's death; the examination held regular, though one of the witnesses was yet living.

plaintiff thus dying before the execution of the commission, it was insisted, that the suit was thereby abated, the execution of the commission for that reason irregular, and that the deposition should be suppressed; and there being some doubt about the fact, the court referred it to the Master (Mr. *Lightbourn*) to state the fact, with his opinion thereon. THOMPSON'S Case.

The Master stated the fact to be as above; together with his opinion, that the depositions were regularly taken, it being before notice given to the commissioners, or witnesses, that the plaintiff was dead; and that this being in a court of equity, and done to satisfy the conscience of the court; the depositions of the witnesses, where neither the witnesses nor the commissioners had notice of the death of the plaintiff, might reasonably be of as great weight, as if the plaintiff had been really then living: otherwise great delay and expense might ensue to the suitor; and as to the witness that died after examination, if his depositions were to be suppressed, the plaintiff, by the act of God, would be quite deprived of the benefit of his testimony; and the Master grounded his opinion on the case of Sir *Randolph Crew* v. *George Vernon*, esq.; (*a*) where, upon a commission to examine witnesses, some of the witnesses were examined after the demise of the Crown, but before the commissioners had notice thereof, and the commissioners surceased their examination after such notice; and the Lord Keeper [*Coventry*] the Justices *Jones*, *Yelverton*, and *Crook*, with Mr. Baron *Denham*, held the examination regular; and the Judges further held, that the said examination being before notice of the demise of the Crown, the witnesses might be indicted for perjury if they swore false; in regard what the commissioners did was legal, and no inconvenience could result from allowing this evidence; whereas if it were to be adjudged otherwise, many trials, verdicts and attainders, where the proceedings were after the King's demise, but before notice thereof, would be irregular, which would be very mischievous. [196]

(*a*) Cro. Car. 97. 1 Vern. 400. Burch *v.* Maypowder.

Witnesses examined in a commission after the demise of the crown, but before notice thereof, liable to be indicted for perjury, if they swear false.

Whereupon, after hearing counsel on both sides, the Lord Chancellor said, the Master's report was a very judicious one, and held the depositions to be regularly taken.

Then it was insisted by the Attorney-General, that the deposition of the witness that was living, and who might be examined over again, might be suppressed.

But his Lordship said, he would make no difference; and that, though in strictness there was an abatement by the [197]

THOMPSON'S Case. death of the plaintiff, and no such cause *in esse*, as *that* in which the witnesses had been examined; yet it being in a court of equity, and where the commissioners and witnesses had no notice of the plaintiff's death, it could not in reason or justice, affect the validity of the depositions, which were therefore allowed to stand *in toto*, as well with regard to the witness now living, as to the witness that was dead.(*x*)

(*x*) And see Toth. 99. where depositions were ordered to be published, notwithstanding they were taken during an abatement by marriage of a female plaintiff. So *Sinclair* v. *James*, 1 Dick. 277.

9. Sim. 141.

Case 49.

LORD CARTERET *v.* PASCHAL.

Lord Chancellor KING. 2 Eq. Ca. Ab. 89. pl. 15, &c.

UPON the marriage of Sir *Thomas Bromsall* with *Mary Coling*, articles were entered into, dated the 7th of *October*, 1704, whereby Sir *Thomas Bromsall* covenanted to settle 500*l.* a year on his then intended wife *Mary* for her life, for her jointure.

Sir *Thomas Bromsall*, soon after the marriage, died; and dame *Mary*, his widow, brought her bill in equity, to recover her 500*l.* *per annum*, and the arrears and future payments. And whereas the Lady *Bromsall* had agreed to buy in a mortgage on part of the real estate of Sir *Thomas Bromsall*, comprised in these articles; on the 5th of *March*, *septimo Annæ*, it was decreed by the Lord Chancellor *Cowper*, that the possession of certain lands mentioned in the decree, part of the real estate of Sir *Thomas Bromsall*, and which was liable to a mortgage before made thereof, should be forthwith delivered to the Lady *Bromsall;* and that the tenants thereof should pay their arrears of rents and future rents to her, and that she should enjoy the same, until she
[198] should be reimbursed what she should have paid towards the mortgage on the estate, with interest, and likewise all arrears of her annuity or yearly rent of 500*l.* with costs, and the Master to see what the same should amount to.

Lady *Bromsall* married Doctor *Herbert;* whereupon the suit being revived, the Master reported 4527*l.* 15*s.* 7*d.* to be due for the arrears of this rent at *Lady-day*, 1714; which

report was confirmed. By indenture dated the 9th of *June*, 1729, Dr. *Herbert* assigned the said arrears of 4527*l.* 15*s.* 7*d.* and all subsequent arrears, together with all benefit of the said decree, and the proceedings thereupon, to the Lord *Carteret* and Sir *Clement Cotterell*, and also demised the said annuity or yearly rent of 500*l.* unto them the said Lord *Carteret*, and Sir *Clement Cotterell*, for ninety years, if Doctor *Herbert* and Lady *Bromsall* his wife should so long live; and by deed poll dated the 12th of the said *June*, 1729, it was declared, that the said assignment was intended to vest the property of the said debt in the said trustees, in trust, that after the Lady *Bromsall's* death, and not before, they should pay 500*l.* due from Doctor *Herbert* and his said wife, to Sir *Thomas Cross*, Baronet; and afterwards should pay 3900*l.*, to the Lady *Granville*, in full of all demands due to her, and in trust to pay the residue to such persons, and in such manner, as he by his deed or will should appoint.

In *October*, 1729, Doctor *Herbert* died: afterwards Lady *Bromsall*, surviving her said husband, died on the 2d of *April*, 1730.

Under this assignment and deed of trust made by Doctor *Herbert*, Sir *Thomas Cross* claimed his debt of 500*l.* upon a bond due from Doctor *Herbert;* Lady *Granville* also claimed the 3900*l.*, by way of debt due from the said Doctor *Herbert.*

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And the assignment being voluntary as to the surplus, the question was, whether the administratrix of Doctor *Herbert*, who was the defendant *Susannah Herbert*, or the administratrix of Lady *Bromsall*, who was the defendant *Elizabeth Paschal*, was entitled to this surplus?

A man possessed of a chose en action, in his own right, may assign it, though without a consideration. (*a*) Ante 87. Jones *v.* Earl of Strafford.

And first it was admitted on all sides, that if a man in his own right be entitled to a bond, or other *chose en action*, he may assign it without any consideration: but here, it was said, was a *chose en action*, which the husband had only in right of his wife; in which case he had no (*a*) absolute title to it, but only a right to endeavour to reduce it into possession, if he could, during the joint-lives of him and his wife: which, if he should not be able to do, the same would remain, as it was originally in the wife; for which the case in 2 *Vern.* 401. of *Burnet* v. *Kinaston* was cited, and relied upon as in point; the court also appearing to be of the same opinion.

Lord CARTERET *v.* PASCHAL.

2*dly*, It was agreed, that where the baron is thus entitled to a *chose en action*, [D] as he may release or forfeit it, so if he should assign it for a valuable consideration, (as had undoubtedly been done in the principal case, in respect to Sir *Thomas Cross* and Lady *Granville*,) it would be good.

Baron possessed of a chose en action in right of his wife, may assign it for a valuable consideration. Secus, as it seems, if there be no consideration.

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3*dly*, It was also admitted, that in the principal case there was a diversity betwixt the arrears of rent that accrued during the coverture, and such as had grown due before the coverture; and that, as the profits of the wife's land would belong to the husband during the coverture, so the rent issuing out of the land during that time, and which was payable by the ter-tenant in respect of the profits, might belong to the husband; for which reason, the authorities say, that the husband may alone avow for rent incurred during the coverture.(*b*)

(*b*) 1 Roll. Ab. 358.

But with regard to the decree obtained for these arrears by the husband and wife, it was insisted, that this did not any way alter the case, for that the decree was but in nature of a judgment; and if there should be a joint judgment obtained by the husband and wife, and the husband in his lifetime, without any consideration, should assign it, this would not prevent the judgment (nor by the same reason a decree) from surviving to the wife, if the husband should die first, as he did in this case; and that consequently the administratrix of the Lady *Bromsall* was entitled.

The Lord Chancellor took time till the next day to consider of it, when he declared it to be his opinion, that not only Sir *Thomas Cross* and Lady *Granville*, (in trust for whom this assignment was made) as they were just creditors, and for a valuable consideration, were entitled to the benefit

If the wife has a judgment, and it is extended upon an elegit, the husband may assign it without a consideration; so if a judgment be given in trust for a feme sole, who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries; the husband may assign it without any consideration; for it is in nature of an extent.

[D] It is to be observed, that in all cases where a husband makes a settlement of his own estate on his wife, in consideration of her fortune; the wife's portion, though consisting of *choses en action*, and though there be no particular agreement for that purpose, is looked on as purchased by him, and will go to his executors. *Precedents in Chancery*, 63, *Cleland* v. *Cleland*, and 2 *Vern.* 501. *Blois and Martin* v. *Lady Hereford*. The same point appears to have been determined by the Lord *Cowper* in the case of *Packer* v. *Wyndham*, *Mich.* 1715, according to the author's Report of that case. Pre. Cha. 412.

Lord CARTERET *v.* PASCHAL. [*201]

of such assignment: but that also considering how this case was *circumstanced, even the voluntary assignment of the surplus of the arrears by Doctor *Herbert* altered the property, and would entitle his administratrix thereto in preference to the administratrix of the Lady *Bromsall;* for that the decree said, the Lady *Bromsall* should hold and enjoy the premisses until paid, and that the tenants should attorn to her. Now it was admitted, that under this decree Doctor *Herbert* and his lady were in possession until the Doctor's death; the consequence of which was, that this was an equitable extent, and to be taken as it would be, were it a legal extent; in which case it would be very plain, that the husband alone might have assigned the extended interest, as in the present case he had done; that suppose a judgment be given to *A.* in trust for a feme sole, who married; and the cognizee of the judgment in trust for the wife, and the wife thereupon, by the consent of such trustee, is in possession of the land extended; surely the husband in such case might alone assign over this extended interest, as he might the trust of a term to which his wife is entitled; according to a solemn resolution of this court, and which was affirmed in the House of Lords in (*a*) Sir *Edward Turner's* case.

(*a*) 1 Vern. 7. 2 Vern. 270. Tuder *v.* Samyne, Pre. Cha. 419. Packer *v.* Wyndham.

Wherefore his Lordship was of opinion, first, that Sir *Thomas Cross* should be paid the money due on his bond; next, that the Lady *Granville* was entitled to her 3900*l.*, and that the surplus of the arrears did belong to the administratrix of Doctor *Herbert*, and not to the administratrix of his wife the Lady *Bromsall.* (1) (*x*)

This decree was afterwards affirmed in the House of Lords. (2)

(1) Vide *Squib* v. *Wynn*, ante, 1 vol. 378.

(2) 4 Bro. P. C. 168.

(*x*) And see *Mitford* v. *Mitford*, 9 Ves. 87, 98. and *Bosvil* v. *Brander*, ante, 1 vol. 458.

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TERM. S. MICHAELIS, 1733.

Case 50.

BROWN ET UX' *v.* ELTON.

On an Appeal from a Decree at the Rolls.

Lord Chancellor KING.

2 Eq. Ca. Ab. 241. pl. 29. Husband and wife sue for a legacy given to the wife; the court will not compel the payment of it, unless the husband makes some settlement on the wife.

SIR *John Brown* married a young gentlewoman, who had a legacy of 400*l.* left her, payable at her marriage. Sir *John Brown* demanded the legacy, but the executor refused to pay it, unless some settlement or provision were made for the lady: but on those terms offered to pay the legacy. Sir *John* refused to make any settlement, (nor as yet had he made any) and with his wife brought this bill for the recovery of the legacy.

The cause being first heard at the Rolls, it was there ordered, that the plaintiff, Sir *John*, should make his proposals before the Master, and should also pay the costs of the suit, in regard it appeared that the defendant, the executor, as well before the bill was brought, as also by his answer, offered to pay the legacy, on Sir *John's* consenting to make the settlement on his lady.

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And now, on Sir *John's* appealing from this decree to the Lord Chancellor, it was insisted by the Attorney-General and Mr. *Willes*, that this being a legacy given out of a personal estate only, the plaintiff and his wife might have sued for the same in the spiritual court, and recovered it, without being tied down to any terms of making a settlement; and measures of justice ought, as much as possible, to be uniform and

consistent in all courts; that as this was a mere personalty, which the husband might release, (*a*) the imposing terms upon him was taking from him the benefit of the law. Besides, 400*l.* was a small sum to require a settlement for; and there have been instances (*b*) where equity has refused to compel the laying out very small portions; that since the executor had admitted assets, he was rather to be looked on as a debtor for this 400*l.* than as a trustee; and supposing it to be the case of a common debt, it must seem a pretty strange defence made by a debtor, when sued by his creditor, to say, "I will not pay your debt, because you have not made "a jointure or settlement on your wife."

(*a*) See the next case preceding.

(*b*) Adams *v.* Pierce, ante, 13.

In answer to which it was urged for the defendant, that those who would *have* equity, ought to *do* equity; that where the husband could recover the wife's portion at law, equity would not interpose, so as to compel a settlement or provision for the wife: but where the husband comes here to be assisted in recovering his wife's portion, this court may give their assistance on what terms they shall think reasonable, and nothing can be more reasonable than that care should be taken to make a proper provision for the wife, and the issue of the marriage; that agreeable to this has been the constant practice, as in 2 *Vern.* 494. Lady *Oxenden's* case, where it is said by the Lord Keeper [*Wright,*] that a court of equity will oblige a husband, who comes there for his wife's portion, to make a settlement upon her by way of jointure, or to secure a maintenance to her, in case she survives. So in 2 *Vern.* 626. *Lupton et Ux'* v. *Tempest et al'*, a diversity is taken by the Lord *Cowper*, between a husband and wife's coming into equity, to demand an execution of the trust of a real estate, (in which case the court will make no terms with the husband, forasmuch as when the wife has recovered the estate, she may keep it;) and where a husband sues there for a personal demand, in right of his wife; because, as this latter, when recovered, will belong to the husband, therefore this court may insist upon terms, as being in diminution of his right. Also the case of *Jacobson* v. *Williams* (*a*) was cited, where the husband was a bankrupt, and entitled to a legacy given to his wife *dum sola*, and the assignees under the commission sued for this legacy; whereupon the Lord *Cowper*, and after him the Lord *Macclesfield*, denied relief, until some provision was made thereout for the wife; for that the assignees under the commission could be

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(*a*) Vol. I. 382.

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in no better condition than the husband, the bankrupt himself; and he would not have been entitled thereto without providing for his wife. So in the case of *Dod* v. *Hall*, on the last day of petitions before the present Lord Chancellor, the husband was not allowed to have his wife's portion, without first making his proposals before a Master, in order to a settlement or provision for her.

[205] Neither was it material, what the spiritual court would have done, had the husband and wife applied there for the legacy; since, as this was the constant practice of this court, and a reasonable one too, there could be no colour to make a different rule here from what had been observed in like cases: and though the sum was but 400*l.*, still it was something, and might serve to supply the wife with the bare necessaries of life; that the defendant, the executor, could not be considered as a mere stranger, for he was related to the wife, and consequently under a double obligation, both as her relation and trustee, (every executor being a trustee for the performance of the will) to see her provided for in the most beneficial manner.

Lord Chancellor: I found it to be the practice at my coming into this court, to enforce the husband, before he recovers by the aid (1) of equity his wife's portion, to make a settlement; and as such practice has so long obtained, I shall not, at this time, take upon me to alter it; although it seems to break in upon the legal (*a*) title, which the husband has to his wife's personal estate; and this method, however intended originally as a cautionary provision in favour of the wife, has sometimes proved inconvenient, but yet custom and long usage have sufficiently established it; nevertheless I will reverse that part of the decree below, which orders the

(*a*) See Milner v. Colmer, 2 vol. 642.

(1) Vide *Harrison* v. *Buckle*, 1 Stra. 239. *Milner* v. *Colmer*, ante, 2 vol. 639. *Adams* v. *Pierce*, ante, 11. *Jewson* v. *Moulson*, 2 Atk. 420. *Attorney-General* v. *Whorwood*, 1 Vez. 538. *Jacobson* v. *Williams*, ante, 1 vol. 383. (*y*)

(*y*) Where the wife has only a life interest, the court will not compel a settlement by the husband, unless in case of his insolvency or desertion of his wife, or other extreme misconduct; nor will they, except for the above reasons, deprive him of the interest of his wife's fortune, although he refuse to make a settlement. *Bond* v. *Simmons*, 3 Atk. 20. *Sleech* v. *Thorington*, 2 Vez. sen. 560. *Like* v. *Beresford*, 3 Ves. 511. *Macaulay* v. *Philips*, 4 Ves. 15. *Wright* v. *Morlay*, 11 Ves. 12. *Atherton* v. *Nowell*, 1 Cox 229. *Elliott* v. *Cordell*, 5 Mad. 156.

plaintiff, Sir *John Brown*, to pay costs to the defendant; for I will not condemn a man to pay costs for insisting upon a right, which the law gives him: so let there be no costs [A] on either side: but as the plaintiff, Sir *John Brown*, now offers to make a settlement upon his wife, that settlement must be made at his own charge.

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One ought not to be condemned to pay costs in this court, for insisting on a right which the law gives him.

[A] *Sed quær'* the equity of this part of the decree, whereby the executor was to pay costs out of his own pocket, (that being the consequence of ordering no costs on either side) for a conduct which the court itself has ever approved of. (*x*)

(*x*) *Taylor* v. *Glanville*, 3 Mad. 176.

NIGHTINGALE AND OTHERS *v.* EARL FERRERS.

Case 51.

Sir JOSEPH JEKYLL, Master of the Rolls.

ROBERT, late Baron (afterwards Earl) *Ferrers*, was seised for his life only of his family estate, with remainder to his first, &c. son in tail male successively. The Lord *Ferrers* had several sons, the first of whom, named *Robert*, was an infant of about seventeen; and a very advantageous match being agreed upon betwixt the said eldest son and the only daughter of Sir *Humphrey Ferrers*, articles were entered into dated 26th of *September*, 1688, and the Lord *Ferrers* and his eldest son *Robert* were parties to and sealed the said articles, whereby the Lord *Ferrers* covenanted, that he and his said eldest son should within a year after the son should come of age, by fine or recovery, or such other good conveyances or assurances as the young lady's counsel should advise, convey and settle the bulk of the family estate, as to all the premises (except the manors of *Astwell* and *Falcott)* to the use of the Lord *Ferrers* for life; and as to the manors of *Astwell* and *Falcott*, from the time of the fine and recovery suffered, and as to the rest of the premises from the death of the Lord *Ferrers*, to the use of the said *Robert* Shirley* for life, remainder to his first, &c. son in tail male successively, remainder to the use of his younger brothers for their lives

The father tenant for life, remainder to the son in tail, with remainder over. The son is an infant, and on an advantageous proposal for the son's marriage, the father and infant son join in marriage articles, and the father only covenants, that within a year after the son's coming to age, the father and son will join in a fine and recovery of the family estate to divers uses.

The infant son seals the deed, and within a year after he comes to age, joins with his father in a fine and recovery; the infant son's sealing of these articles not sufficient to declare the uses of the fine and recovery.

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successively, remainder to their first, &c. son in tail male successively, with a power to the Lord *Ferrers*, the father, to revoke all the uses except those limited to his eldest son, and his then intended wife, and their issue male.

The marriage took effect, and the infant eldest son, having thus during his infancy sealed this deed together with his father, afterwards came of age, and pursuant to the covenant within the year after coming of age, *(viz.)* in *Michaelmas* term then next following, joined with his father in levying a fine and suffering a recovery: but there was no deed, after the most diligent search, to be found, for leading the uses of this fine and recovery. Afterwards the Lord *Ferrers* revoked the uses of all the premises limited to his younger sons and their issue, except as to the manors of *Astwell* and *Falcott*. *Robert Shirley* the eldest son soon after died, as did also his said wife, leaving issue only one daughter, since married to the present Earl of *Northampton*. And the late Earl *Ferrers*, and also the sons that were elder than the present Earl *Ferrers*, (who had been found a lunatic) were dead without issue male.

This matter was formerly stirred before the Lord *King*, who was of opinion, that the said articles could be intended as preparatory only to something further, and would not of themselves amount to a declaration of the uses. But now coming on again before his Honour,

On behalf of the present Earl *Ferrers* it was objected, that
[208] these articles, that were executed by the Lord *Ferrers*, the father, and his infant son, were sufficient to declare the uses of the fine and recovery.

The deed of an infant only voidable.

First, For that an infant's deed is not void, but only voidable: for which reason an infant cannot plead *non est factum* to his deed, as a feme covert may.

Secondly, Because when the infant in the principal case sealed the deed, though there was no covenant from him to levy the fine, and suffer the recovery and declare the uses thereof, (these covenants being only his father's;) yet the infant son's sealing and executing the deed had this effect, *(viz.)* to shew his consent to the deed, and consequently his agreement that the fine and recovery should enure to the uses of the deed. And supposing that, after this declaration of the uses by the father, the son had said no more in the deed than that he consented and agreed that the fine and recovery should be to these uses; this would have been suf-

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No precise form of words requisite to declare the uses of a fine and recovery, it being sufficient if the meaning of the parties appears.

ficient to have declared the uses, and surely thus much was implied by the infant son's having executed the deed.

Thirdly, That a very slight thing, and words though very improper, will yet serve to declare the uses of a fine or recovery, which require no set form of words for that purpose, but only enough to shew the intent of the parties. Now here was sufficient evidence of such intent: and though this was done by an infant; yet when the infant came of age, and had, within the exact time limited by the articles, levied a fine and suffered a recovery; as his execution of the deed before shewed his original intention to be, that the fine, &c. should be to those uses: so his joining with his father in the fine and recovery, as soon as he came of age, manifested a continuance of such intention. And as a proof that an infant's deed is not void, but voidable only, the common case was mentioned of an infant's making a lease, reserving a rent, this lease is liable to be avoided: but if the infant comes of age, and accepts the rent, such acceptance affirms the lease, and makes the same unavoidable.

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Fourthly, The infant son's continuing in possession of the manors of *Astwell* and *Falcott*, after he came of age, to which manors he could have no title during his father's life, but under the articles and deed of uses of this recovery, was said to be a sufficient assent to the articles.

Fifthly, Suppose the son had been an infant as well at the time of the recovery, as when the articles were executed, this had been good, and the recovery unavoidable after he came of age; and it surely could not make the case worse, that the son was of age when he suffered this recovery.

Farther: That the infant's suffering a recovery in compliance with the father's covenant, was stronger than a matter *in pais*; as in the case before put of an infant's accepting of rent after he came of age, upon a lease made during his infancy.

Master of the Rolls. Though slight words will declare the use of a fine, &c. yet here are no words at all used by the infant son, who did, it is true, join with his father in executing the articles; but it was the Lord *Ferrers*, the father only, who covenanted, that he and his son would levy the fine and suffer the recovery to these uses. The most then that can be made of this case is, that here is a fine and recovery by the father and son, the one tenant for life, the other a remainder man in tail; and the uses are declared by the father, the tenant for

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life only, which can no way affect the uses of the remainder in tail. Neither can it be reasonable to interpret the son's sealing a deed (so blind and uncertain in its nature) to devest such infant son of the inheritance of this great estate, and to make him but tenant for life thereof. The case put of an infant's affirming a lease for years made during his infancy, by acceptance of the rent after he comes of age, is not similar; because there the rent is in lieu of the profits of the land; whereas in the principal case no rent was reserved, nor any inheritance given to the son in return for the inheritance of this great estate which the other side would construe him out of. (1) Besides, this is a stale point, given up by Earl *Washington*, the present Earl's elder brother, who gave the Earl and Countess of *Northampton* 15,000*l.* to join in a fine and recovery, to re-settle the whole family estate, which accordingly has been done in a solemn manner, and some provision (though a small one) has been made for the unfortunate present Earl the lunatic. Wherefore the Master of the Rolls, agreeable to the opinion of the Lord *King*, disallowed and over-ruled this claim, as likely to put the lunatic Earl to an unprofitable expense and an unsuccessful suit. [B]

[B] Sir *Peter Temple* tenant for life, remainder to his son *Richard Temple* for life, remainder to his first, &c. son in tail. Sir *Peter Temple* by indenture *tripartite* (between Sir *Peter* of the first part, *Richard* of the second part, and *J. S.* of the third part) covenanted to levy a fine of the premises: but *Richard* the son did not join in any covenant in the deed, nor in the fine, but *sealed* the deed. And by *Hale*, Chief Justice. This can be no surrender, in regard the remainderman cannot surrender, but only release to the tenant for life. And the bare sealing the deed by *Richard* the son will neither surrender nor release his estate; consequently, the contingent remainder to the first, &c. son is preserved, there being a right of freehold subsisting in *Richard* the son, for the supporting of this right. *Hales* v. *Risley*, 3 *Keb.* 326, 759, 818.

(1) Sed vide *Cannel* v. *Buckle*, ante, 2 vol. 244. as to the contracts of infants in consideration of marriage.

2. Russ. Mu. 493
(94). 2. Q. B. 153.
1906. 2. Ch. 308.
1918. 1. Ch. 95.

Edmund Lechmere, Esq. Nephew and Heir of the late Lord Lechmere, } Plaintiff.

Charles Earl of Carlisle, Elizabeth Lady Lechmere, Widow and Administratrix of the Lord Lechmere, et al', } Defendants.

Case 52.

Sir Joseph Jekyll, Master of the Rolls.

Ca. tem. Tal. 80.
2 Eq. Ca. Ab. 31. pl. 42. 258. pl. 12. 462. pl. 17. 501. pl. 35.
Money agreed to be laid out in land shall be taken as land, and go to the heir. And no difference where the money thus agreed to be laid out and settled is deposited in the hands of trustees, and where it remains in the hands of the covenantor: the agreement binding in both cases, and making it as land.

The bill was brought by the nephew and heir of the late Lord *Lechmere*, to compel a specific performance of marriage articles.

Upon the marriage of *Nicholas* late Lord *Lechmere*, with the Lady *Elizabeth Howard*, one of the daughters of the defendant the Earl of *Carlisle*, articles were entered into, dated 30th of *April*, 1719, whereby, reciting the said intended marriage, the Earl of *Carlisle* covenanted to pay the Lord *Lechmere* 6000*l.* as the portion of his said daughter, and the Lord *Lechmere* covenanted for himself and his heirs, with certain trustees, within a year after his marriage, to lay out the said 6000*l.* and 24,000*l.* of his own money, in the purchase of freehold lands and tenements in fee simple, in possession in the South part of *Great Britain*, with the consent of the Earl of *Carlisle* and the Lord *Morpeth*, their executors and administrators; the lands when purchased to be settled to the use of the Lord *Lechmere* for life *sans* waste, remainder to trustees and their heirs during his life to support contingent remainders, and after the Lord *Lechmere's* death, in trust to pay 800*l.* *per annum*, clear of all charges,* (except parliamentary taxes) to the defendant the Lady *Elizabeth Howard*, his then intended wife, for her jointure, and after the determination of these respective estates, remainder to the first, &c. son of the marriage in tail male, remainder to trustees for 500 years, to raise portions for daughters of the marriage, remainder to the Lord *Lechmere* in fee. The 500 years' term to be void if no daughter; and until the purchase made, the interest to be paid to the several parties that would

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LECHMERE v. Earl of CARLISLE.

have been entitled to the rents and profits of the land when purchased, at the rate of 5*l. per cent.*

The marriage took effect, and the Lord *Carlisle* paid 4000*l.* part of the portion to the Lord *Lechmere*, and gave his bond for the remaining 2000*l.* which had also been since paid to the defendant the Lady *Lechmere*.

The Lord *Lechmere* was seised of some lands in fee at the time of the marriage of about 300*l. per annum*, and after his marriage purchased some estates in fee of about 500*l. per annum*, and some estates for lives, and other reversionary estates in fee, expectant on lives, and contracted for the purchase of some estates in fee in possession, and on the 18th of *June*, 1727, died intestate, without issue, and without having made a settlement of any estate. None of the purchases or contracts were made by the Lord *Lechmere* with the consent of the trustees. Mr. *Lechmere*, his Lordship's nephew and heir, brought this bill to have a specific performance of the articles, and the 30,000*l.* laid out as therein is agreed, and to have interest at the rate of 5*l. per cent.* in the mean time.

[213] The defendants in their answer insisted; that the Lord *Lechmere* intended only a provision for the lady and the issue of the marriage: and the plaintiff claiming under the limitation of the remainder in fee to the right heirs of the Lord *Lechmere*, the articles as to him were voluntary, and therefore ought not to be carried into execution in his favour, to the prejudice of the widow and next of kin; that the whole real estate of the Lord *Lechmere*, or at least so much as was purchased or contracted for after the marriage, should be subject to the lady's jointure of 800*l. per annum*, and that the whole 30,000*l.*, with the rest of the personal estate, should be distributed according to the statute.

Upon this case Sir *Joseph Jekyll*, Master of the Rolls, after deliberation, thus delivered his opinion.

The question upon these articles is, whether the heir at law be entitled to have this 30,000*l.* taken out of the personal estate and invested, pursuant to the articles; or, in other words, whether the same be to be taken as land? and I hold that it must, for these reasons:—

First, For that the Lord *Lechmere* was compellable in equity to lay out this 30,000*l.*, and settle it agreeably to the articles.

Secondly, Because the Lord *Lechmere* living after the year

within which time the purchase was to be made and settled, had broken his covenant.

Thirdly, For that in consequence thereof, the trustees might have brought their bill, and have compelled his Lordship in his lifetime to make such purchase and settlement.

Fourthly, For that the trustees not commencing their suit in equity, or at law, shall not prejudice any person entitled to have this settlement made. And,

Fifthly, In regard the land descended, and which was under the value of what the Lord *Lechmere* was bound to settle, shall not be taken for or towards a satisfaction of the lands articled to be settled. [214]

With respect to the *first*, it is most plain, and according to the express words of the articles, that the Lord *Lechmere* was bound to lay out the sum of 30,000*l.* in the purchase of freehold lands in fée simple, and to settle them pursuant to the articles, and this within a year after the date of the articles: this seems so evident, that nothing will be attempted to be said against it.

2*dly*, It seems almost equally clear, that the Lord *Lechmere's* not having made this purchase and settlement within a year was a breach of his covenant. It has indeed been objected, that something was to be done *previously* by the trustees, *(viz)* that they were to consent: but my opinion is, that the trustees were not to do the first act: the Lord *Lechmere* ought to have proposed his purchase and settlement, upon which the trustees were to have signified their agreement or disagreement thereto; whereas in the present case it is not pretended his Lordship made one single step towards this settlement; consequently, he had broken his covenant.

3*dly*, The covenant being thus broken by the Lord *Lechmere*, the trustees might either have brought an action at law on the covenant, or a bill in equity, to have compelled a specific performance thereof. The wife's fortune had been advanced, *(viz.)* 4000*l.* in money, and 2000*l.* secured by bond; so that the trustees had plainly this power: but it is probable they thought all was safe, and that the Lord *Lechmere* was well able (as indeed he was) to make a purchase; and that, in the mean time, it would be more beneficial to him to receive the interest of the money, than the profits of the land. Now if the trustees had, after the expiration of the year, filed their bill for an execution of these articles, a [215]

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court of equity would, and must, have decreed a performance. And taking this to be so,

A trustee forbearing to do what it was his office to do, shall not prejudice the cestuy que trust; for then it would be in the power of a trustee to affect the right of a cestuy que trust.

4thly, The forbearance of the trustees in not doing what it was their office to have done, shall in no sort prejudice the *cestuy que trusts*, (*x*) since at that rate it would be in the power of trustees, either by doing, or delaying to do, their duty, to affect the right of other persons; which can never be maintained. Wherefore the rule in all such cases is, that what ought to have been done, shall be taken as done; and a rule so powerful it is, as to alter the very nature of things; to make money land, and on the contrary, to turn land into money; thus money articled to be laid out in land, shall be taken as land, and descend to the heir; and on the other hand, land agreed to be sold, shall be considered as personal estate. 1 *Salk.* 154.

Whatever, for a valuable consideration, is covenanted to be done, shall in equity be looked on as done: thus, money agreed to be laid out in land, shall be taken as land, et e converso.

Indeed it has been objected, that there is a difference betwixt money being deposited in the hands of trustees to be invested, and where there is no such deposit, but a man covenants (as here) to lay out so much money in land, and to settle it.

Resp'. But as to this, there is no manner of difference in reason; for the nature of the thing is changed by the agreement, of which it is the business of a court of equity to enforce an execution. In the case of *Kettleby* v. *Atwood*, 1 *Vern.* 298, it was agreed by marriage articles, that the wife having 1500*l.* portion, the husband should add 500*l.* more to it; and that the whole should be deposited in trustees' hands, until a convenient purchase could be found out for investing the same in land, which, when purchased, should be settled on the husband and wife for their lives, with remainder to their first, &c. son in tail, remainder to their daughters in tail, remainder to the right heirs of the husband. Before the making of the purchase the husband died, leaving issue by his said wife a daughter, who died about a month old. The wife administered to the husband and daughter; and the

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1500*l.* in the hands of the wife's trustees, and 500*l.* in the husband's hands, is covenanted to be laid out in land, and settled on the husband for life, remainder to the wife for life, remainder to the first, &c. son, remainder to the daughters, remainder in fee to the husband. They have issue a daughter, the husband dies, soon after which the daughter dies, before the purchase made, and then the wife dies; the money shall, as land, go to the heir of the husband.

(*x*) Sed vide *Wych* v. *The East India Company*, post. 309. *Hovenden* v. *Lord Annesley*, 2 Sch. and Lef. 629. *Pentland* v. *Stokes*, 2 Ba. and Be. 74.

heir of the husband brought his bill to have the money laid out in the purchase of land to be settled on the wife for life only, remainder to the plaintiff in fee; and though the then (*a*) Lord Keeper [*North*] refused to make a decree for that purpose, and dismissed the bill, but without costs, yet the party did not think fit to rest there, but reheard the cause before the Lord Chancellor *Jeffereys* (*b*) who decreed for the heir, holding that the money was bound by the articles, and should be for the benefit of the heir, as the land would have gone if purchased. This case is in point, and the determination often allowed to be right; wherein it is observable, that but part of the money, (*viz.*) that of the wife, was in trustees' hands, the husband not having deposited the 500*l.* which he was to advance; and yet no difference was taken with regard to the two sums: also, *there* was a failure of issue of the marriage, (as here) and the dispute betwixt the wife, the administratrix of the husband, and the collateral heir, who was as much a volunteer as the remainderman in the principal case, and equally out of the consideration of the articles; notwithstanding which the decree was as above, taking the money to be as land, as well with regard to the collateral heir, as to the issue of the marriage. So in 2 *Vern.* 101, *Lancy* v. *Fairchild*, money by marriage articles was to be laid out in land, and settled on the husband and wife, and their issue, remainder to the heirs of the wife, the wife died in the life-time of the husband; and decreed for the heir of the wife against her administrator; the money being said to be bound by the articles, agreeably to the resolution in the above cited case of *Kettleby* v. *Atwood*; though no money appeared to have been deposited; and an execution of the agreement was asked by the collateral heir at law, who could not be within the immediate view and prospect of the articles. And indeed this is no more than what even courts of law have come into; for which reason, when money by a marriage agreement is articled to be invested in land, that money is held not to be assets for payments of debts, according to the case of *Lawrence* v. *Beverley*, cited in *Kettleby* v. *Atwood*; where money secured by a mortgage, to which an executor was legally entitled, yet, being articled to be laid out in land, and settled on the issue of the marriage, it was by *Hale* Chief Justice, on a special verdict, adjudged to be bound by the articles.

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(*a*) 1 Vern. 299.

(*b*) 1 Vern. 471.

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Money articled on marriage to be laid out in land, and settled, shall go as land, though the wife be dead without issue.

See 2. Atkyns's 452.

Money articled on marriage to be laid out in land, and settled, is not assets even at law.

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Money part of which is the husband's, and other part the wife's, is on marriage to be laid out in land, and settled on the husband for life, remainder to the wife for life, remainder to the heirs of their two bodies, and the uses go no further; the heir of the husband shall have the whole.

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The case of *Knight* v. *Atkins*, 2 *Vern.* 20. is still stronger to this purpose: upon marriage articles, 1500*l.* was the wife's portion, to which the husband was to add 1500*l.*; the whole 3000*l.* to be invested in land, and settled on the husband for life, remainder to the wife for her jointure, remainder to the heirs of their two bodies, stopping short there, and not expressing where the estate should go afterwards. The husband * died without issue; upon which his collateral heir brought his bill to have the money laid out in a purchase of land to be settled on the wife for life, remainder to the plaintiff in fee, as heir at law of the husband. The objection was, that it was reasonable the remainder in fee should go to the right heirs of the survivor, and consequently that the wife having survived, was entitled, or at least, that she had a good claim to her own 1500*l.*, or the land to be purchased therewith; but for the heir of the husband it was answered, that this must be taken as if the bill had been brought in the lifetime of the husband and wife, when the court would have decreed the remainder in fee to the husband. Accordingly, the Lord *Jeffereys* decreed the whole money to the heir of the husband, on a presumption that it was so intended. Here then the heir of the husband was allowed to go away with the fee, though no money had been deposited in the hands of trustees, though the heir was out of the consideration of the articles, and though there was no express limitation to the heirs of the husband; which I take to have been a right decree.

Where money is on marriage to be laid out in a purchase, and settled to the common uses in a marriage settlement, adding the clause, that the purchase shall be made with the consent of the husband and wife, it makes no diversity, though no consent was given to any purchase made during the life of the husband

In 2 *Vern.* 227. *Symons* v. *Rutter*, there is this case: it was agreed by marriage articles, that 500*l.* of the wife's portion should be lodged with Sir *Francis Child* and *William Pain*, to be placed out at interest, until it could be invested in a purchase, with the consent of the wife and her then intended husband, in houses, or lands of inheritance, to be settled on the husband and wife for their lives, remainder to the heirs of their two bodies, remainder to the heirs of the body of the wife, remainder to the wife's brother in fee; the 500*l.* was deposited in the hands of trustees, and * before any purchase made, the wife died without issue, and the husband having afterwards received the interest during his life, died; upon which the wife's brother brought his bill for this money, by virtue of the remainder in and wife; for still the money shall be taken as land.

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fee limited to him, as brother and heir of the wife, and also as having administration to her *de bonis non* administered by the husband, who survived the wife. *Trevor*, *Rawlinson*, and *Hutchins*, were at that time Lords Commissioners of the great seal, the two former of whom held, that the 500*l.* being to be looked on as money, and not as land, belonged to the defendant as administrator of the husband: that it was not in all events to be laid out in a purchase, but only by consent of the husband and wife, who, it did not appear, had ever consented; and if it had been invested, and a settlement made, the husband, as tenant in tail, might have barred it by a recovery. On the contrary, *Hutchins* conceived that this 500*l.* being money agreed to be laid out in land, was to be taken as land: that it was plain, after the death either of the husband or of the wife, it was to be looked upon as land, and the purchase might have been made during the life of the survivor: that by the articles the survivor was entitled to the interest only during his life, and until the purchase made; and, having no issue, he could be but tenant in tail after possibility of issue extinct; that, to him, this case seemed to be governed by the rule that had been taken in the several cases of *Whitwick* (1) v. *Jermyn*, or *Lawrence* (2) v. *Beverley*, and *Kettleby* v. *Atwood*; and must not, upon the same circumstances, be deemed personal estate, which in other cases had been looked on as land, and gone as real estate.

In this last case, I observe, it was admitted, that if there had not been the clause in the articles, that the purchase should be made with the consent of the husband and wife, it must have been taken as land: now such clause makes no manner of difference; for, upon a convenient purchase being proposed, the court would have taken on themselves to judge thereof; and, without some reasonable objection made, would have ordered the money to be laid out in it, so that such clause seems to have been immaterial in the marriage articles, and as if omitted, and the opinion of *Hutchins* to have been well grounded. [220]

But against this there has been objected the case of *Chichester* v. *Bickerstaff*, 2 *Vern.* 295. Where, upon Sir *John Chichester's* marrying the daughter of Sir *Charles Bickerstaff*, Sir *Charles* articled to pay 1500*l.* as part of his

(1) 2 Vern. 58. (2) 2 Keb. 841.

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daughter's portion, which, together with 1500*l.* more to be advanced by Sir *John Chichester*, was, within three years after the marriage, to be invested in land, and settled on Sir *John Chichester* for life, remainder to his intended wife for life, remainder to their first, &c. son in tail male, remainder to the daughters in tail, remainder to the right heirs of Sir *John* the husband. Within a year after the marriage, Sir *John* and his lady both fell ill of the small-pox; the wife died first, and three days after Sir *John* died without issue, having made his will, and appointed his sister, *Frances Chichester*, his residuary legatee. Sir *Arthur Chichester*, the brother and heir, brought his bill, claiming the money thus agreed to be laid out in land, the remainder in fee whereof, in case of failure of issue of the marriage, was to go to the heir of the deceased husband. *Sed per curiam;* this money which would have been land, as to the issue of the marriage, yet, now the husband and the wife are dead without issue, is turned into money again, and under the power of the husband to dispose of as he pleased. It should [221] have gone to his administrator, had there been *no* will; *à fortiori* will it, in the present case, go to his residuary legatee.

Now, with respect to this case, it is remarkable, that the wife died within three years after the marriage, during which period the purchase was to be made; so that the time was not come within which the money was to be laid out, and till then it continued money; or, possibly, the court had some evidence to induce them to believe Sir *John Chichester* looked on the money as personal estate: and if this does not distinguish it from the other cases, I doubt, in opposition to so many decrees, the resolution here given would hardly be maintainable.

Money articled to be laid out in lands, and settled on husband and wife and issue, remainder in fee to the husband, will pass by the devise of a real estate, though the money was never laid out.

Afterwards came the case of *Lingen* v. *Sowray*, (*a*) in 1715, reported in the Book, called *The Abridgment of Cases in Equity*, 175, where 700*l.* of the husband's money, and 700*l.* of the wife's money, was, on a marriage, articled to be laid out in land, and settled on the husband for life, remainder to the wife for life, remainder to the first, &c. son in tail male, remainder to the daughters in tail, remainder to the heirs of the husband. The husband devised all his personal estate to his wife, and all his real estate to the plaintiff, and died without issue. Whereupon it was decreed, that the money articled to be laid out in land was as land and could

(*a*) See also Precedents in Chan. 400, and vol. 1. 172. In which last book the case is more fully reported, and agreeably to the Register's book.

not pass by the devise of the [C] personal, but belonged to the plaintiff * as devisee of the real estate. And this decree, first made by the Lord *Harcourt*, in 1711, was affirmed in 1715, by the Lord *Cowper*.

Still later than this case, was that of *Edwards* v. (*a*) *The Countess of Warwick*, decreed in chancery, and affirmed in the House of Lords, where money was articled to be laid out in land and settled on the husband and wife, and the issue of the marriage, remainder to the heirs of the husband. There was issue, but such issue died without issue before the money was laid out; and decreed, that the money was to be looked upon as land, and should go to the heir. Neither is the objection, that the plaintiff is a volunteer, of any weight; for this is the case of a trust; and every *cestuy que trust*, whether a volunteer or not, or be the limitation under which he claims, with or without a consideration, is entitled to the aid of a court of equity, in order to avail himself of the benefit of the trust. There can be no reason, that the trustee should retain to his own use the trust money or estate, with respect to which he is barely an instrument, in breach of the confidence reposed in him. Any voluntary bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt. Indeed, if the bond be merely voluntary, a real debt, though by simple contract only, shall have the preference: but if there be no debt at all, then a bond, however voluntary, must be paid by an executor. Besides, in some cases, this court may be under a necessity of determining questions between volunteers, I mean, between persons that are really such, with regard to those from whom they claim; as where the heir comes to have his real estate disencumbered, by applying the personal estate in exoneration thereof, there the objection of being a volunteer is strong against the plaintiff, and yet the court of equity must determine the point.

(*a*) 2 vol. 171.

Every cestuy que trust, whether a volunteer or not, is entitled to the benefit of the trust; and no reason that the trustee should keep the estate.

Any voluntary bond good against the executor, though to be postponed to a simple contract debt.

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[C] It is observable, that the husband might have devised this 1400*l.* (subject to his wife's estate for life) either as real or personal estate, according as he should have signified his intention. Thus, if he had in his will described it as so much money agreed to be laid out in land, this would have been sufficient to have made it pass as personal estate, and by a will not attested by three witnesses; but without such a particular interposition of the testator, manifesting his intention, it remained as land, and consequently belonged to the devisee, or representative of the real, not of the personal estate. Determined in the cases of *Cross* v. *Addenbroke*, *Hilary*, 1719. *Fulham* v. *Jones*, *Mich.* 1720, both by the Lord *Parker*. But more particularly in the case of *Edwards* v. *The Countess of Warwick*, vol. 2. 171.

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A.'s father articles with a carpenter to pay him 1000*l.* to build an house on his estate, the carpenter covenants to build it. A. dies; the heir of A. shall compel the building of the house, and the executor pay for it.

In 2 *Vern.* 322. *Holt* v. *Holt*, the father of *J. S.* articled with a carpenter to pay him 1000*l.* for the building of an house upon his land, and the carpenter articled with the father to build the house. The father died intestate before the house was begun to be built, and the land on which the house was to be built descended to the son and heir. Held, that the son might compel the widow and administratrix of the husband, who owned the ground on which, &c. to lay out the 1000*l.* in building the house, although the son, who sought, and was allowed to take the benefit of this covenant, did not entitle himself thereto by any manner of consideration.

Articles on marriage, whereby money is agreed to be laid out in land, and settled, in default of issue male of the marriage, on the husband's brother, shall, if the husband dies without issue male, and leaving only daughters, be performed in favour of the brother, though they were voluntary, and though the husband might have barred such remainder.

So, in *Vernon* v. *Vernon* (*a*), decreed first by the Lord *King*, and affirmed in the House of Lords. *A.* covenanted on his marriage to lay out 7000*l.* in land, and settle it on himself for life, remainder to his wife for life, remainder to the first, &c. son of the marriage in tail male, remainder to the heirs male of the body of *A.*, remainder to *A.*'s brother for life, remainder to his first, &c. son. Now, though this remainder seemed merely voluntary, and out of all the considerations of the marriage settlement, and though *A.* (as was there well urged) had the land been settled * by him in his life-time, might have barred the brother by a common recovery, yet, on *A.*'s leaving only daughters, equity compelled a specific performance of the covenant.(1)

(*a*) vol. 2. 594.

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There remains then only the last point, which is, whether the lands which descended from the Lord *Lechmere* to his heir at law, shall be taken for or towards a satisfaction of the covenant, as to this remainder limited to his own right heirs.

A. covenants for himself and his heirs, that he will purchase lands, and settle the same on himself for life, remainder to his wife for life, remainder to his first, &c. son, remainder to himself in fee; equity will compel the executor to lay out the money, though the heir is both debtor and creditor.

And here it is objected, that the Lord *Lechmere* covenants for himself and his heirs, to lay out 26,000*l.* in the purchase of lands, and to settle the same on himself and wife, and first, &c. son, and for portions for daughters, remainder to his own right heirs. So that in this case the heir is debtor, as bound in the covenant, and yet claims as a creditor under the covenant, which is inconsistent, (*viz.*) for

(1) Et vide *Osgood* v. *Strode*, ante, 2 vol. 245.

the same person to be both debtor and creditor; and as far as the heir has real assets, the assets are at home already, and cannot be sued for.

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Resp'. So, if a man articles for a purchase, and binds himself, his heirs, executors, &c. he may as well be called, in that case, covenantor and covenantee, as in the present; and yet, in respect of the different rights that are in him, the heir may compel the executor to complete the purchase for him. Though, to speak properly, the heir at law cannot be considered as a creditor any more than as a purchaser under his ancestor; but as heir, he is the representative of his ancestor, so as to be entitled to all the real estate, which the ancestor died seised of; and, on the other hand, liable to answer all the burdens to which such real estate is subject.

Then, with regard to the lands left to descend, 1*st*, It is plain the covenant does not relate to the lands which were his Lordship's at the time of entering into the articles, the words being *future*, (*viz.*) that he *would* purchase lands. 2*dly*, The purchase of the leasehold estates for lives, or reversions expectant on estates for lives, are nothing to the purpose, since the lands to be bought are expressly mentioned to be lands of inheritance and in fee-simple, whereas these could not answer the intent of the articles. Indeed, what ought to govern in all these cases of implied satisfaction, is the intention of the parties. Now, in the principal case, the intention of the party does not plainly appear, that his estate which he permitted to descend, and which did not amount to the value of what he articled to purchase, should be for or towards a satisfaction, consequently this would be to disinherit an heir by an implication not necessary, contrary to the known maxim of law.

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It is the intention of the party which makes the pretended equivalent a satisfaction, or not.

As to the case of *Wilcox* v. *Wilcox*, 2 *Vern.* 558. where a man upon his marriage covenanted to purchase lands of 200*l. per annum*, and to settle them on himself for life, remainder to his wife for life, for her jointure, remainder to his first, &c. son in tail male, remainder to his daughters in tail; and the father purchased lands of 200*l. per annum*, after which he made no settlement, but permitted them to descend; whereupon this was decreed to be a satisfaction of the covenant: here the father made a purchase fully sufficient to answer the 200*l. per annum*. The book takes notice, that

A father's permitting lands to descend in fee, if just of the same value with lands covenanted to be settled in tail; this is a satisfaction.

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the lands were worth 200*l.* *per annum*, which imports that they were just of that value; and this plainly shews, that the lands were bought with an intention to satisfy the covenant, and the eldest son could not complain, or object, when he had his 200*l.* *per annum* from his father, that it was another estate than what was covenanted to be settled upon him, (*viz.*) that it was a fee-simple instead of an intail; for which cause this seems to have been a reasonable decree. And, by the way, if the eldest son had aliened the fee, and died without issue, I do not think the second son could have recovered under these articles; for if it had been an estate-tail, he might have barred it by a recovery [D]: whereas in the present case the Lord *Lechmere* has not permitted lands to descend to his heir to the value of what he articled to purchase, and lands of less value shall never be looked upon as an equivalent. The lands to be purchased according to the covenant are to be to the amount of 30,000*l.*; and as the lands purchased before the marriage, together with the leasehold and reversions purchased afterwards, are not to be taken as part of the lands to be bought and settled: so the rest of the purchases which he made are of very inconsiderable value, and it cannot be presumed his Lordship intended they should be so construed.

A matter of less value cannot be taken in satisfaction of what is of a greater value.

Land, though of much greater value left to a daughter, no satisfaction of a portion.

In the case of *Goodfellow* v. *Burchet*, 2 *Vern.* 298. a man, on the marriage of his daughter, gave a bond to her husband for part of the portion, after which by his will he gave her land of much greater value, and yet this was held to be no satisfaction,[E] although there were not assets to pay debts, which is a strong case. And there it is laid down as a rule, that where a legacy has been decreed to go in satisfaction of a debt, it must have been grounded upon some evidence, or at least upon a strong presumption that the testator did so intend it: but in the present case there is no such evidence, nor any room for such a presumption.

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In the case of *Cuthbert* v. *Peacock*, 1 *Salk.* 155. it was

[D] But *quære*, if the eldest son had died, (as he might have done) before the then next term, so that he could not have suffered a recovery, whether then the next son ought to be barred of his chance.

[E] However this might be determined on another principle, (*viz.*) that money and land being of a quite different nature, the one shall never be taken as a satisfaction for the other. See many cases to this purpose, but particularly the case of *Chaplin* v. *Chaplin*, determined *Paschæ*, 1734, by the Lord *Talbot*, post. 247.

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insisted on as a rule, that where a debtor gives a legacy greater than his debt, it shall be intended a satisfaction, because the testator must be presumed to be just before he is bountiful. But the Lord *Cowper* said, it might as well be presumed that a debtor, where there are assets, intends to be both just and bountiful. So in *Cranmer's* case, *Salk.* 508. it was decreed by the Lord *Harcourt*, that a legacy, though it exceeded the debt, could not be intended as a satisfaction thereof; and indeed it may be presumed, that if the testator intended to pay or satisfy a debt, he would certainly have taken notice of it.

So that upon the whole matter; I decree that this 30,000*l.* thus agreed to be laid out in land, shall be taken as land; that the land permitted to descend to the heir shall not be deemed to be in, or towards, satisfaction of the debt; consequently, that the administratrix must invest this 30,000*l.* in a purchase, and settle it pursuant to the articles. But though these have provided that 5*l. per cent.* shall be paid until a purchase made; yet it appearing to me that the money has been placed in the government funds, which have yielded but 4*l. per cent.*, I think I may with reason and equity moderate the interest, and reduce it to 4*l. per cent.* in regard the administratrix has made no more of it.

Though by a deed 5*l.* per cent. was directed to be allowed, yet it appearing that the money had been placed in the government funds, which yielded but 4*l.* the court reduced the interest to 4*l.* per cent.

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Note; On an appeal to the Lord *Talbot*, *Paschæ*, 1735, after long debate, his Honour's decree was so far affirmed, as that the 30,000*l.* articled to be laid out in land was by his Lordship held to be as land; who moreover agreed, that no difference had ever been made, between the cases where the money was deposited in the hands of a third person to be laid out, and where it was resting in the hands of the covenantor: but with respect to the freehold lands purchased in fee simple, in possession, after the covenant, though with but part of the 30,000*l.* and left to descend, these were by the Lord Chancellor ordered to go as a satisfaction *pro tanto*; for that it could not be intended the Lord *Lechmere* was obliged to lay out all the money together; nay, it might be doubtful, whether one entire purchase could be met with for just that sum; and though his Lordship had covenanted to lay out the 30,000*l.* in land, yet he had not covenanted to lay it out in one purchase, or at one time: but if it was in-

30,000*l.* is covenanted to be laid out in land, the money need not be laid out altogether upon one purchase, but if laid out at several times it is sufficient; and if the covenantor dies, having purchased some lands which are left to descend, this will be a satisfaction pro tanto.

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vested at several times, it would satisfy the covenant, as much as if laid out all together. (1)

(1) Reg. Lib. B. 1734. fol. 487. So, *Deacon* v. *Smith*, 3 Atk. 323. *Attorney-General* v. *Whorwood*, 1 Vez. 540. *Davys* v. *Howard*, 5 Bro. P. C. 552. *Sowden* v. *Sowden*, at the Rolls. *Feb.* 3, 1785 (*y*). Reg. Lib. B. 1784. fol. 171.

(*y*) 1 Cox 165. S. C. 1 Bro. C. C. 582. See also the note to *Blandy* v. *Widmore*, ante, 1 vol. 324., and *Garthshore* v. *Chalie*, 10 Ves. 1.

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TERM. S. HILLARII, 1733.

CHAPLIN *v.* CHAPLIN.

Case 53. Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 384. pl. 10, 11. The wife of cestuy que trust not to be endowed.

IN this long cause, among many others, were the following questions:—The Lady *Hanby*, the grandmother of *Porter Chaplin*, being seised in fee, conveyed divers lands to the use and intent that certain trustees in the deed named should receive and enjoy a rent-charge of 30*l. per annum* to them and their heirs, with power to distrain for the said rent, and to enter and hold the land on non-payment for forty days; and then the said rent was to be to the use of *Porter Chaplin* in tail male, remainder to the use of the same persons that had the land in fee. *Porter Chaplin*, to whom this estate tail was limited in the rent, died, leaving issue Sir *John Chaplin*, who inter-married with the plaintiff the Lady *Chaplin*, and afterwards died without issue male. Whereupon one question was, whether the plaintiff, the Lady *Chaplin*, was dowable of this rent of which her husband died seised in tail male?

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If a rent de novo be granted in tail, without any remainder over, and tenant in tail takes wife and dies without issue; the wife shall not be endowed, because the thing out of which the dower is to arise, is not in being.

And the court held, that supposing this were a rent created *de novo*, the remainder in fee whereof was extinguished by a limitation of it to those that had the land, such rent being determined by the death of the husband tenant in tail, and having no longer any existence, the wife cannot be endowed of that which is not in being: but that it is otherwise where tenant in tail of *land* marries and dies without issue, whereby that estate-tail is determined; for the wife in that case shall be endowed notwithstanding, because the land is in being, though the estate tail therein is determined, and the dower is in some respects a continuance of the estate tail. So if a rent *in esse* be granted to *A.* in tail, remainder to *B.* in fee, and

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A. marries and dies without issue, the wife shall be endowed; or if a rent *de novo* be granted to *A.* in tail, remainder to *B.* in fee, (which has been [A] adjudged a good remainder) and *A.* marries and dies without issue; his wife shall be endowed.

Secus, if the rent were granted in tail, remainder over.

Moreover, the court conceived, that if such a rent *de novo*, be granted in tail without any remainder over, and the tenant in tail suffers a recovery thereof; this recovery, though it will turn the estate tail into a fee, yet the same will pass but a determinable fee, which must end on the death of the tenant in tail without issue, for the grantor never agreed to charge the land any further with the rent, and it would be a wrong to the tertenant to burthen his estate with the rent for any longer time. See 2 *Lutw.* 1225. (1)

Tenant in tail of a rent granted de novo without any remainder over suffers a recovery; this will not pass an absolute but only a determinable fee.

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But it was afterwards disclosed to the court, that the legal estate of the rent in fee was in trustees, in trust for *Porter Chaplin* in tail male; and that on his dying, the trust of this estate-tail descended to his only son Sir *John Chaplin* in tail, the husband of the plaintiff the Lady *Chaplin*, who *(inter al')* brought her bill for her dower of this rent; and then the case was no more, than whether the wife of a *cestuy que trust* in tail should be endowed?

Whereupon for the plaintiff were cited, *first*, the case of *Sweetapple* v. *Bindon*, 2 *Vern.* 536. where a woman bequeathed money to be laid out in land, to be settled to the use of her daughter and her children, and if she died without issue, to go over. The daughter married the plaintiff, by whom she had issue: but she and the issue being both dead, and the money not laid out; on a bill brought by the husband, the Lord *Cowper* decreed the money to be considered as land, and the plaintiff to be tenant by the curtesy.

Secondly, *Otway* v. *Hudson*, 2 *Vern.* 583. where tenant in tail of a trust of a copyhold estate, having desired the lord to admit him, and being refused, and having brought a bill against the trustees to have a surrender made him of the legal estate, died. In that case, though the husband was never seised of the legal estate of the copyhold, yet the widow was decreed her free bench.

[A] For, though the objection is, that there can be no remainder of that whereof there is no reversion; yet the intent of the party gives the rent *de novo* first a being for the whole, and then the lesser estates are carved out of it. By *Holt*, Chief Justice, *Salk.* 577. *Weeks* v. *Peach.*

(1) Harg. Co. Litt. 241. *a.* note 4. 298. *a.* note 2.

Thirdly, The case of *Fletcher* v. *Robinson*, as cited in *Precedents in Chancery*, 250. where *J. S.* falling into some trouble for having counterfeited a warrant, conveyed his land to his younger son, in trust only to secure it against a forfeiture; and afterwards being freed from trouble, conveyed the premises to his eldest son, and died. The eldest son died, leaving a widow and no issue, whereupon his widow being non-suited at law, brought her bill in equity, and had a decree for her thirds.

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Fourthly, That nothing was more known, than that a dowress shall have the benefit of a trust term attendant on the inheritance against an heir, as appeared from the cases of *The Lady Dudley* v. *The Lord Dudley*, *Precedents in Chancery*, 241. *Higford* v. *Higford*, *Paschæ*, 1711. *Abridgment of Cases in Equity*, 219. and more particularly from that of (*a*) *Wray* v. *Williams*.

(*a*) 1 Vol. 137.

Lastly, It was said to have been agreed and settled, that a man should be tenant by curtesy of a trust; and it would not be pretended that there were less stronger reasons to be urged in favour of a dowress.

But after much debate and consideration, the Lord Chancellor was of opinion against the plaintiff in this point; observing, *first*, as to the case of *Sweetapple* v. *Bindon*, that it might be right to allow an husband to be tenant by the curtesy of money to be laid out in land, since money agreed to be laid out in land is as land in equity; where every thing directed by a will, or agreed by articles to be done, is looked upon as done. [B]

Secondly, That in the case of *Otway* v. *Hudson*, the decree was not made upon a general rule, that every widow of a *cestuy que trust* has a right to dower; but upon the great and obstinate delay of the trustee, who refused to convey, and stood out in a bill in this court requiring him so to do.

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Thirdly, That the case cited from *Precedents in Chancery*, 250, seemed a strange case, and a most extraordinary trust; for if the father, the *cestuy que trust*, should have come for a performance of that trust, he could never have reco-

[B] This will serve to warrant the resolution of the Master of the Rolls in the case of *Banks* v. *Sutton*, vol. 2. 700. For however that learned argument may be considered, as tending to prove in general, that a woman ought to be endowed of a trust; yet, in that particular case, the legal estate was by the will of the donor directed to be conveyed to the *cestuy que trust* at his age of twenty-one; and he living to that age, according to the principle above mentioned, his widow was well entitled to dower.

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vered; but the son should have held the land discharged, it being a fraudulent trust, made to protect the estate against a forfeiture. This, probably, was a short note of the case for the private use of some gentleman, and can be of service to no other.

Fourthly, That the case of a trust term set up in opposition to dower, was nothing like the present; for there the judgment is, that the plaintiff in dower shall recover, but that *cesset executio* during the term; and if the trusts of such term are satisfied, and at an end, the term ought not to subsist in equity to stop a favourite right at law, as dower is, whereas in the case of a trust, there is no judgment at law, that the wife shall recover her dower; for the husband had no legal estate, nor consequently any thing of which the wife is dowable. And in the case of a purchaser, nay, even with notice, the court would not relieve a dowress against a trust term that stood in her way. (*a*)

(*a*) Eq. Ca. Ab. 219. Pre. Cha. 65. Ca. in Parl. 69.

His Lordship took notice, that by the preamble of the statute of uses, (*b*) it is recited, that by means of these uses the wife was defeated of her dower; by which it appears, that the wife of *cestuy que use* was not dowable at common law; and if so, then, as at common law an use was the same as a trust is now, it follows, that the wife can no more be endowed of a trust now, than at common law, and before the statute, she could be endowed of an use; so that here was the opinion of the whole parliament in the point; that it had been the common practice of conveyancers, agreeable hereto, to place the legal estate in trustees on purpose to prevent dower; wherefore it would be of the most dangerous consequence to titles, and throw things into confusion, contrary to former opinions, and the advice of so many eminent and learned men, to let in the claim of dower upon trust estates; that he took it to be settled, that the husband should be tenant by the [C] curtesy of a trust, though the wife could not have dower thereof; for which diversity, as he could see no reason, so neither should he have made it; but since it had prevailed, he would not alter it; that there did not appear to be so much as one single case, where abstracting from all other circumstances, it had been determined there should be dower of a trust. (1) For which reason, his Lordship dis-

(*b*) 27 Hen. 8. c. 10.

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Husband may be tenant by the curtesy of a trust; though the wife cannot have dower thereof.

[C] So determined by his Lordship in the case of *Caseburn* v. *English*, about this time on an appeal from the Rolls. 1 *Atk.* 603.

(1) Vide *Banks* v. *Sutton*, ante, 2 vol. 700.

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Tenant in tail of lands mortgaged, not bound to keep down the interest as tenant for life is.

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missed the bill as to such part of it as claimed dower of the trust of this rent.[D]

Another point in this cause was, that *Porter Chaplin* made a mortgage for years, and then intailed the estate mortgaged on himself, and the heirs male of his body, remainder to his brother *Thomas Chaplin*, in * tail male, and died, leaving issue one infant son, who suffered the interest to incur on the mortgage for several years, and died just before he came of age, leaving a personal estate. Whereupon it was objected, that the executors of the infant son, seeing their testator took the rents and profits of this estate, ought to keep down the interest, the rather, for that he never had it in his power to bar the remainder by a recovery.

Lord Chancellor. There is no precedent of a tenant in tail being obliged to keep down the interest on a mortgage: a tenant for life is, without doubt, compellable to do it; but as a tenant in tail has an estate, which may last for ever, and the remainder over is not assets, nor regarded in law; and as such tenant in tail has a power over the estate, to commit any waste or spoil thereon, a court of equity has never enjoined him to keep down the interest.(2) Wherefore his Lordship refused to make any order upon the executors of the tenant in tail, to pay any arrears of interest, though it appeared there was near twenty years' interest due, and though in this case, the tenant in tail died during his infancy, and consequently before it was in his power to have barred the remainder by a recovery.

[D] Afterwards, in the case of *Shepherd* v. *Shepherd*, heard in *March*, 1735-6, before the Lord *Talbot*, the same point coming in question, the Attorney-General and Mr. *Fazakerly*, who were of counsel with the widow, apprehended it to have been so clearly settled by the above resolution, that they both declined speaking to it.

(2) Vide *Amesbury* v. *Brown*, 1 Vez. 477.(*x*)

(*x*) *Ware* v. *Polhill*, 11 Ves. 257. *Burges* v. *Mawbey*, 1 Turn. 167.

WROTTESLEY *v.* BENDISH.

On exceptions to the Master's report.

Case 54.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 517. pl. 16.

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11. Q. 13. D. 252.

SIR *Hugh Wrottesley* by his marriage settlement secured to his daughters that he should have by his lady, in case of no son, 8000*l.* among them, payable at their ages of twenty-one, or days of marriage, which should first happen, provided, if any of his daughters should, after his death, marry under her age of twenty-one, and without the consent of her mother, that then such daughter should *forfeit* her portion, which should go over to the other daughters. The father died, leaving no son, and four daughters.

The defendant *Bendish* married one of the daughters, and (as was pretended) without the consent of the mother; whereupon the other daughters brought their bill against the defendant, the married daughter, and her husband, and thereby among other things they asked the married daughter whether she married with her mother's consent?

The defendants did not demur to that part of the bill, but submitted to answer; and the husband answered even to some circumstances of the marriage, as that he took it he was encouraged by the mother in his addresses to the daughter, and that the mother knew of it; but the daughter, his wife, did not answer to the point, whether she did not marry without her mother's consent: upon which, exceptions being taken to her answer, the same was reported insufficient; and now exceptions were taken to the Master's report, which coming on to be argued,

It was objected that the wife was not bound to answer;—for if she did, yet her answer could not be read against the husband, nor could she be a witness against him; wherefore it was a vain thing to insist upon her answering, when such answer could not be made use of, after it should be put in, being no more to be regarded than the answer of an infant. Besides, the wife is supposed to be *sub potestate viri,* and not to answer freely.

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To which it was replied, that the same argument might be

made use of against a feme covert's answering any bill, when made a co-defendant with her husband, which is contrary to all rules of practice; and therefore this objection ought not to prevail. Moreover, the wife might survive her husband, in which case her answer might be read against herself; and that this case differed from that of an infant's answering; where, it is true, the answer cannot be read against such infant, (and yet it has been sometimes ordered that an infant should answer, notwithstanding his infancy,) but the true reason why the infant's answer is not to be read against him is, because in reality it is [E] not the answer of the infant, but of the guardian, who is sworn, and not the infant; and the infant may know nothing of the contents of the answer put in for him by his guardian, or may be of those tender years as not to be able to judge of it.

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An infant's answer cannot be given in evidence against him, because it is not the infant's answer, but the guardian's, and the guardian is sworn, and not the infant.

Lord Chancellor: I do not now give any opinion whether the answer may be read against the wife, when discovert, or not; but as in all times heretofore the wife, as well as the husband, has been compelled to answer, I would not take upon myself to overthrow what has been the constant practice. (*y*)

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Baron and feme defendants to a bill; the feme must answer, tho' the answer cannot be read against the husband, but may (possibly) be read against her, if she survive.

[E] An infant's answer by his guardian is not evidence against him, because the infant is not sworn, and it is only for making proper parties. Carthew 79.(*x*) And where an infant is defendant, the service of the *subpœna* to hear judgment must be on the guardian, and not on the infant. See vol. 2. 643. *Taylor* v. *Atwood*. But where a defendant puts in an answer to a bill brought by an infant, who does not reply to it, in such case, it seems the answer must be taken to be true, in regard the defendant, for want of a replication, is deprived of an opportunity of examining witnesses to prove his answer: and he ought not to suffer for such omission in the plaintiff. So ruled at the Rolls, with some warmth, by Sir *Joseph Jekyll* in the case of *Thurston and Dechair, an infant*, v. *Nutton & Ux. Trinity* 1733, in which the reporter was of counsel with the plaintiff, and much opposed the reading of the answer; for that the plaintiff being an infant, could admit nothing; and it might be very mischievous, if by reason of the neglect of the plaintiff, the infant's guardian or *prochein amy*, in not putting in a replication to the answer, such answer should be read, and admitted to be true, though never so detrimental to the infant's inheritance. *Ideo quære.* (1)

(1) Et vide contra *Legard* v. *Sheffield*, 2 Atk. 377.

(*x*) *Savage* v. *Carroll*, 1 Ba. & Be. 553; and exceptions will not lie to an infant's answer, *Strudwick* v. *Pargiter*, Bunb. 338. *Copeland* v. *Wheeler*, 4 Bro. C. C. 256. *Lucas* v. *Lucas*, 13 Ves. 274.

(*y*) But the wife shall not be compelled to answer a mere bill of discovery, *Barron* v. *Grillard*, 3 V. & B. 165.

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(*a*) Salk. 550. 1 Vern. 60, 109, 110.(*z*)

Then it was objected, that this answer of the wife tended to make her liable to a forfeiture, which in (*a*) no case would be assisted in a court of equity; that had the defendants, instead of answering, put in a demurrer, it must have been allowed; and it would be very hard to make this mistake so extremely penal to them.

But in this case the feme not bound to answer the bill subjecting her to a forfeiture, though the husband had submitted to answer.

Lord Chancellor: I should have made no question, if the defendants had demurred, of allowing (1) the demurrer; but they having submitted to answer, and the husband having answered as to his marriage, that the wife's mother knew of the courtship, and having fully answered the bill, and the present exception being to the wife's answer only, I am somewhat doubtful how to determine. But at length, considering that this bill was to entitle the plaintiffs to a forfeiture, which word *forfeiture* was the very word used in the deed; and since the wife was in danger of having that forced from her by the compulsion of a court of equity, which might occasion the loss of the whole provision made for her; and all this in the case of a forfeiture, so little favoured in this court, against which, (2) in many cases, relief is given, unless where there is a devise over, (as in the present case;) and it being a condition which, by the ecclesiastical courts, is held void in all cases, the rule being there, that (*b*) *maritagium debet esse liberum:* under these circumstances his Lordship said he could not reconcile himself to the compelling a wife to confess that by which she might forfeit all she had in the world; and that, though the defendants had not demurred, as they should have done, yet, the case being now

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(*b*) Vol. 2. 528, 531.

(1) Vide *Chauncey* v. *Tahourden*, 2 Atk. 392. *Chancey* v. *Fenhoulet*, 2 Vez. 265.(*y*)

(2) Vide *Peyton* v. *Bury*, ante, 2 vol. 626.

(*z*) *Williams* v. *Farrington*, 3 Bro. C. C. 39. S. C. 2 Cox. 202. *Parkhurst* v. *Lowten*, 1 Mer. 401. Besides the case of forfeiture above mentioned, there are other grounds upon which a defendant may by answer protect himself from making a full answer, namely, that he might criminate himself, *Baker* v. *Mellish*, 11 Ves. 73. *Rowe* v. *Teed*, 15 Ves. 378. *Mant* v. *Scott*, 3 Price 493. *Curzon* v. *De la Zouch*, 1 Swan. 192. *Leonard* v. *Leonard*, 1 Ba. & Be. 323. That he is a purchaser for a valuable consideration without notice, *Jerrard* v. *Saunders*, 2 Ves. Jun. 454. *Rowe* v. *Teed*, ub. sup. *Leonard* v. *Leonard*, ub. sup., sed vide *Ovey* v. *Leighton*, 2 S. & S. 234. That the discovery sought is immaterial to the matter of the suit, *Agar* v. *The Regent's Canal Comp.* Coop. 212.; and, as was holden in *Stratford* v. *Hogan*, 2 Ba. & Be. 164., that the knowledge was acquired in a privileged character.

(*y*) *Lord Uxbridge* v. *Staveland*, 1 Vez. Sen. 56.

fully before him, it seemed not agreeable to the rules of equity to make the defendants suffer so much for the mistake of their counsel. Whereupon the exception to the Master's report was allowed, and the answer held to be sufficient.(3)

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(3) But, *generally*, a defendant must answer fully, or object to the discovery by *plea* or *demurrer*, *Cookson* v. *Ellison*, 2 Bro. C. C. 252. *Cartwright* v. *Hately*, 3 Bro. C. C. 238, and 1 Ves. Jun. 292. *Shepherd* v. *Roberts*, 3 Bro. C. C. 239. *Hall* v. *Noyes*, 3 Bro. C. C. 483. *Selby* v. *Selby*, 4 Bro. C. C. 11. (*z*)

(*z*) *Jacobs* v. *Goodman*, 2 Cox 282. *Jerrard* v. *Saunders*, ub. sup. *Marquis of Donegal* v. *Stewart*, 3 Ves. 446. *Phelips* v. *Caney*, 4 Ves. 107. *Taylor* v. *Milner*, 11 Ves. 41. *Dolder* v. v. *Lord Huntingfield*, 11 Ves. 283. *Faulder* v. *Stuart*, 11 Ves. 296. *Shaw* v. *Ching*, 11 Ves. 303. *Rowe* v. *Teed*, ub. sup. *Somerville* v. *Mackay*, 16 Ves. 387. *Agar* v. *the Regent's Canal Comp.* ub. sup. *Leonard* v. *Leonard*, ub. sup. *Mazarredo* v. *Maitland*, 3 Mad. 70. —— v. *Harrison*, 4 Mad. 252. *Thorpe* v. *Macaulay*, 5 Mad. 231.; but the practice in the Court of Exchequer differs from that established in Chancery by the above cases, for in that Court the answer of a defendant may be supported against exceptions if the matter of exception would have been good ground of demurrer, or might have been made available by plea. *Richardson* v. *Hulbert*, 1 Anst. 65. *Selby* v. *Selby*, 4 Bro. C. C. 11. The reason of this difference is, that exceptions are in the Exchequer brought before the Court itself in the first instance, instead of being referred to a Master. *Rowe* v. *Teed*, ub. sup. *Agar* v. *The Regent's Canal Comp.* ub. sup.

SELLON *v.* LEWEN.

Case 55.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 75. pl. 31.

THE plaintiff brought his bill against *B.*, who pleaded to the whole bill; and the court, on arguing the plea, saved the benefit thereof, ordering that it should stand for an answer; but it was not said, one way or other, whether the plaintiff should have liberty to except.

The defendant pleads to the whole bill; and, on arguing the plea, it was ordered to stand for an answer, without saying one way or other, whether the plaintiff might except; the plaintiff cannot except, for that the court, in saying that the plea shall stand for an answer, must be intended to have meant a sufficient answer; an insufficient answer being as none.

After this, the plaintiff put in exceptions to the answer, supposing the plea to be now as an answer; and that the court, in saying it should stand for an answer, must have intended a common answer. But the defendant moved to discharge the exceptions, as irregular, insisting that the

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plaintiff can in no such case except to the answer, unless there is express liberty given him so to do; or unless, (as in some cases) it is said, as to such part of it, as is not matter of account.

[240] On the other side it was objected, that of course the plaintiff has liberty to except, unless where the court does by express words take it from him; and that in the present case it would be a great hardship on the plaintiff, if he might not have the benefit of a discovery from the defendant.

The *Lord Chancellor*, doubting as to the practice, ordered precedents to be looked into, and that the register should satisfy the court what had been the course in such cases, and that it should be moved again.

Accordingly this matter was moved the first day of next term, when, on producing precedents, the *Lord Chancellor* held, that when the court orders that the plea shall stand for an answer, without saying more, it must be intended (1) a sufficient answer, an insufficient answer being as no answer. Wherefore this being taken to be a sufficient answer, and no express liberty to except, the order to refer the exceptions, and the exceptions themselves, were discharged.(2)

(1) *Coke* v. *Wilcocks*, Mos. 74. *Maitland* v. *Wilson*, 3 Atk. 815.

(2) But with liberty for the plaintiff to re-argue the plea. Reg. Lib. B. 1733. fol. 130.

Case 56.

MARTIN *v.* KERRIDGE.

Lord Chancellor TALBOT.

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In Chancery, not only the body of the defendant, but also his lands and goods, are liable to a sequestration: but no sequestration lies till the time for the return of the attachment is out, on which the body was taken. (*x*)

MARTIN had recovered a decree for 1300*l.* against the defendant *Kerridge;* and had sued out an attachment, returnable last term, against him, and on *non est inventus* returned, took out an attachment against him, returnable next term. On which * attachment the defendant being taken, turned himself over to the *Fleet;* and the next day (being the first seal after *Hilary* term) upon a certificate of the warden of the *Fleet*, that he was a prisoner there, the matter

(*x*) After the return of cepi corpus to an attachment for want of appearance, a messenger must go before sequestration issues. *Miles* v. *Lingham*, 7 Ves. 230. *Holme* v. *Cardwell*, 3 Mad. 114.

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having been moved, the Lord Chancellor granted a sequestration, and this order was drawn up, and the sequestration served.

The next seal I moved the court to discharge the order for the sequestration, for that the attachment on which the defendant was taken into custody was not returnable until the next term, all which time the defendant had to pay the money; and it is a most transcendent power exercised by the court of chancery, beyond what the common law allows, that the plaintiff in this court shall take the body, and while that is in execution, seize the land also; but that still this must be, when the defendant lies obstinately in prison, and spends his estate there without paying any of his debts, under which circumstances it might be reasonable the plaintiff should have a sequestration; whereas in the present case it did not appear before the return of the writ, whether the defendant would or would not pay the money, and he had that time to redeem his person.

Lord Chancellor. Until the return of the writ, it is quite uncertain whether the defendant will pay the money or no; and though it may be reasonable, where the court finds that a prisoner obstinately continues in prison, there spending his estate which should go towards satisfaction of his debts, though it may, I say, in that case be but just to let his creditors have such estate; yet this practice with regard to the sequestration, as it is in its nature somewhat extraordinary, ought not to be extended; for which reason, on debate of the matter and hearing counsel on both sides, the order for the sequestration was discharged.(*a*)

Reasonable that a sequestration should lie, in case one taken into custody, by process of chancery, continues in prison without paying his debts.

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(*a*) See 1 Chan. Ca. 91. *Hyde* v. *Petit*, of the rise and progress of sequestrations.

2. Rus Hu. 706.

BUCK *v.* FAWCETT.

Case 57.

Lord Chancellor TALBOT.

UPON a bill brought in equity, the plaintiff and defendant entered into an agreement, which was signed by the parties or their clerks in court, and afterwards by consent made an

An agreement was signed by the parties, and by consent made an order of court, to submit to such decree as the court should make, and neither party to bring an appeal; yet the cause allowed to be reheard.

BUCK v. FAWCETT.

order of court, "That both parties would submit to such de- "cree as the court should make in this cause, provided it "should be on the merits, and not on any mistake in the "pleadings; and that neither party should bring an appeal." The cause was heard, and a decree made. Whereupon the party against whom the decree was, petitioned for a rehearing, which being signed by counsel, a rehearing was ordered by the Lord *King*, who made the decree.

And this day a motion was made to discharge the order for a rehearing, seeing the party petitioning for it had entered into an order by consent to submit to the decree, and not to appeal; that though an appeal is a matter of right, yet it is equally a matter of right, that the party should have it in his power to give up such liberty of appealing, and, if he thinks fit, to debar himself thereof; that as he might release errors at law, so might he also release errors in equity. Nay, it was the usual terms for an injunction, that the party should bring no writ of error; that it was as reasonable one should bind himself from rehearing, as from appealing; that this was
[243] in effect submitting to an arbitration, and that the award of the arbitrators should be final and binding; and was more particularly proper in the principal case, where the decree was to sell a mortgaged estate, which, by the delay of rehearing, might happen to be eaten up with interest; and the agreement being the voluntary act of the parties, ought to be binding.

Lord Chancellor. This order is of a very singular nature; insomuch that had the agreement been disclosed to the court, I hardly believe such order would have been made. Until a decree is signed and enrolled, all matters are open; and if there be any error in the decree, it is fitting the court should have an opportunity of amending it; which is still more reasonable in the principal case, as my predecessor, who heard the cause, has ordered a rehearing, and thereby shewn he was not satisfied with the decree. Let the order stand for a rehearing.(*x*)

(*x*) *Bowker* v. *Hunter*, 2 Dick. 611.

32. Ch. D. 529.
39. — · 148.

JONES *v.* THOMAS.

Case 58.

Lord Chancellor TALBOT.

In a plea of a purchase it is a sufficient denial of notice to say, that at the time of the purchase he had no notice, without saying, or at any time before.

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IN a plea of a purchase, the defendant, in his denial of notice, denied that at the time of making his purchase, and paying his purchase money, he had any notice of the plaintiff's title, &c.

The Attorney General objected, that this was not a good denial of notice, for it might be, he had notice given him *before*, though he had no notice *at the very time of the purchase;* and in such case, the defendant might forget the notice, and would not be liable to a conviction of perjury, if it should appear he had notice only before. Besides, the usual way of pleading is, that the defendant had no notice at, or any time before, the making of the purchase.

Lord Chancellor. Notice before, is notice at the time of the purchase, and the party will in such case, on its being made appear that he had notice before, be liable to be convicted of perjury. Wherefore the plea is well enough, notwithstanding this exception. [F]

[F] In all cases of a plea of a purchase, or marriage settlement, notice must be denied, though not charged by the bill; and it may be sufficient to deny it either by the plea or answer, notwithstanding the objection that it ought to be in the plea, since all the defendant has to do is, to prove his plea; for the defendant is not to prove (1) a negative, *viz.* that he had no notice. However, it seems best to deny notice both in the plea and answer. By the Lord *Parker*, *Aston* v. *Curzon*, *Hil.* 1719: the same point determined by the Lord *King*, in the case of *Weston* v. *Berkeley*, 17 *July*, 1729.(2)

(1) As to negative pleas, vide *Newman* v. *Wallis*, 2 Bro. C. C. 143. *Hall* v. *Noyes*, 3 Bro. C. C. 489.(*x*)

(2) Et vide *Meadows* v. *Duchess of Kingston*, Mitf. Plead. 3d ed. 223. *Davie* v. *Chester*, ibid. *Hoare* v. *Parker*, ibid.(*y*)

(*x*) Negative pleas are now held to be good, *Plummer* v. *May*, 1 Vez. Sen. 426. *Gunn* v. *Prior*, 2 Dick. 657. S. C. 1 Cox 197. *Jones* v. *Davis*, 16 Ves. 262. *Hitchins* v. *Lander*, Coop. 34. *Drew* v. *Drew*, 2 V. & B. 159. *Chamberlain* v. *Agar*, 2 V. & B. 259. *Evans* v. *Harris*, 2 V. & B. 361. *Armitage* v. *Wadsworth*, 1 Mad. 189. *Barker* v. *Ray*, 5 Mad. 64. *Sanders* v. *King*, 6 Mad. 61. *Yorke* v. *Fry*, 6 Mad. 65. *Earl of Strathmore* v. *Countess of Strathmore*, 2 J. & W. 541. *Hook* v. *Dorman*, 1 S. & S. 227. *Warrington* v. *Mothersill*, 7 Price 666. *Thring* v. *Edgar*, 2 S. & S. 274.

(*y*) S. C. 1 Cox 224. *Coke* v. *Wilcocks*, Mos. 73. *Pope* v. *Bish*, 1 Anst. 59. *Edmundson* v. *Hartley*, 1 Anst. 97. *Bayley* v. *Adams*, 6 Ves. 586. *Evans* v. *Harris*, ub. sup. *Cork* v. *Wilcock*, 5 Mad. 328.

DE

TERM. PASCHÆ, 1734.

Case 59.

CHAPLIN *v.* CHAPLIN.

[*See a Branch of this Cause*, ante, 229.]

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 220. pl. 6. 650. pl. 32. In a settlement a term was raised for daughters' portions, (viz.) 10,000*l.* with a proviso, that if the father by deed or will should give or leave the sum of 10,000*l.* to his said daughters, it should be a satisfaction. The father leaves land to the daughters of the value of 10,000*l.* this no satisfaction.

PORTER CHAPLIN, on his marriage with *Ann Sherwyn*, by lease and release dated the 13th and 14th of *June*, 1707, settled his estate in *Lincolnshire*, to the use of himself for life, remainder as to part to his wife for life, remainder to the first, &c. son of the marriage in tail male, remainder to trustees for 500 years, in trust, that if the said *Porter Chaplin* should have no issue male by the marriage, or should have issue male that should die without issue male before their age of twenty-one; then the trustees should raise 10,000*l.* for the daughters of the marriage, payable at eighteen or marriage. In which said settlement there was a proviso, that if *Porter Chaplin* should, by deed or will, give or bequeath any sum of money to his daughters, which should be actually paid to them; then such money, if equal, should be a satisfaction, if not equal, that it *should go towards satisfaction of their portions; unless the said *Porter Chaplin* should by deed or will declare the contrary; with remainder to himself in fee.

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Subsequent to the marriage, the said *Porter Chaplin* charged the said term of 500 years with additional portions of 10,000*l.* to daughters, if no son; but subject to the same trusts and proviso as the former portions were secured to his said daughters.

Afterwards *Porter Chaplin* having three daughters and one infant son by this marriage, did by his will in 1718, de-

vise lands of 200*l.* *per annum* to his uncle Sir *George Thorold* in fee, in trust for his three daughters and their heirs equally, leaving it entirely to his said trustee to sell and dispose of the premises, or otherwise to order or manage the same, as he should think most for the benefit and advantage of his said three daughters, to whom he gave a legacy of 1000*l.* together with the residue of his personal estate. *Porter Chaplin* died, leaving issue this infant son and these three daughters. The son married, and died about the age of twenty years, leaving his wife *privement ensient*, which proved a daughter, so that he died without issue male, whereby the daughters became entitled to this 20,000*l.* charged upon the land. Soon after the death of *Porter Chaplin*, there was a decree for the sale of the lands devised for the payment of the testator's debts and legacies.

It was admitted, that the legacy of 1000*l.* and the surplus of the personal estate, whenever it was paid to the three daughters, should go towards satisfaction of the 10,000*l.*, and 10,000*l.* portions so secured to them as aforesaid; but it was moreover argued that the 200*l.* *per annum* in land devised to Sir *George Thorold*, in trust for the said three daughters, as it was money's worth, and might the very next day after the testator's death be turned into money, was within the meaning of the proviso, which intended only that the daughters should be advanced with portions among them amounting to 20,000*l.*; and that this was the stronger, since the decree obtained for the sale of the land, whereby the same was, at least in equity, turned into money.

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Lord Chancellor. This proviso seems to be little more than what is implied; for when on a marriage a portion is secured to a child out of land, and the parent gives the child a portion [in money] equal to what is so secured, it shall by implication be a satisfaction; and if not equal, yet a satisfaction *pro tanto*. But here the father has limited himself, and ascertained the satisfaction, (*viz.*) that it shall be money, *money actually paid;* and when the same man, that has restrained the satisfaction to money, gives *land* in trust for his daughters; this can no more be said to be money, than money can be termed land, (*a*) which is *alieni generis*, and

Money and land go in a quite different channel, and therefore the one not to be taken in satisfaction for the other.

(*a*) See particularly the case of *Eastwood* v. *Vinck*, 2 Vol. 616. the opinion of the Master of the Rolls express to this purpose.

CHAPLIN *v.* CHAPLIN.

goes in quite a different channel: for instance, the money would go to the daughters' husbands, but the land to their heirs. Suppose there had not been any such proviso in the settlement, then the land given to or in trust for the daughters, would have been no satisfaction; and if so, the proviso makes still stronger against such construction, in that it expressly confines the satisfaction to money, and particularly declares what shall be a satisfaction, which implies a negative, (*viz.*) that nothing else shall. So if the testator had bequeathed a term of years, or some goods to his daughters, these should not have gone towards satisfaction of the
[248] 20,000*l.* Neither will the decree for the sale alter the case; for if this be to be looked upon as a satisfaction, it must have been so at the time of the death of the testator, or not at all. Now, at that time, this being land devised, could not have been so taken; and if the trustee, who by the will is directed to act in every thing *for the benefit and advantage of the daughters*, should, by turning the land into money, make that a satisfaction which otherwise would not have been so, such a proceeding in a trustee would be acting the very reverse of what the testator directs, and a manifest breach of trust. Besides, the coming into such an interpretation of wills would create the greatest confusion, by giving a latitude and power to a Judge to make a new will, and would introduce the utmost uncertainty in the construction thereof.

Wherefore the Lord Chancellor with great clearness determined, that the land devised by *Porter Chaplin*, in trust for the daughters, should not be construed to go towards satisfaction of the 10,000*l.* and 10,000*l.* portions, or either of them, secured to the said daughters by either of the settlements.

. Mr Ca. 46.
. Mr Ht. 660.
. Jur. 857.
Ch. D. 79.
07. 1. Ch. 202

ROBINSON *v.* PETT.

Case 60.

On an Appeal from a Decree at the Rolls.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 454. pl. 10.

The court never allows an executor or trustee for his time and trouble, especially where there is an express legacy for his pains, &c. neither will it alter the case, that the executor renounces, and yet is assisting to the executorship; nor even though it appears, that the executor has deserved more, and benefited the trust, to the prejudice of his own affairs.

THE question was, whether an executor that had renounced, but had yet been assisting in the trust, according to the request of the testator, should have any additional consideration, when he had an express legacy for such his assistance?

Robert Pett, a considerable draper and mercer at *Aspallstoneham*, in *Suffolk*, made his will in *October*, 1710, whereby he devised the surplus of his real and personal estate to his grandchildren, and appointed the defendant *Pett*, who had been first his servant, and afterwards his journeyman, together with one *Larkin*, executors, giving to each of his executors 100*l.* for their trouble about the execution of their trust, and directing, that if the defendant *Larkin* should refuse the executorship, he should lose his legacy; but if the defendant *Pett* should refuse to take on him the executorship, yet that *he* should have this 100*l.* paid him, provided he would be aiding and assisting in the management and execution of the trust. *Larkin* only proved the will, and the defendant *Pett* renounced the executorship.

On a bill brought by the plaintiffs, the grandchildren, against the executors, for an account of the personal estate, the defendant *Pett* was allowed his 100*l.* legacy: but he likewise insisted to have 400*l.* more for his extraordinary pains, trouble, and expense of time in and about the affairs of [250] the testator, particularly for having made up some very intricate accounts, and got in some desperate debts; and there was some proof, that the defendant *Pett* had greatly benefited the testator's estate, and prejudiced his own, (he himself being a mercer) and that he had neglected his own trade, and lost some customers, while he was looking after the concerns of his testator.

ROBINSON v. PETT.

This cause was first heard before the Master of the Rolls, Sir *Joseph Jekyll*, who declared it to be a rule so settled, that a trustee, or executor in trust, should not have any allowance for his care and trouble, unless there were some particular words in the will (1) for that purpose, that he could not break into it; and that there was the less occasion to do so in the present case, as the testator had here given the defendant an express legacy of 100*l.* for his care and trouble; so that the testator himself had set an estimate and value upon it of 100*l.* which since the defendant had accepted, the court could not increase.

From this decree there was an appeal to the Lord Chancellor, before whom it was insisted by the Attorney and Solicitor-General, (who had both signed the petition of appeal) that the defendant *Pett* having renounced the executorship, and the other executor only having proved the will, the defendant *Pett* was as a stranger; and in regard he appeared to have done these eminent services to the estate, so much to his own prejudice, he was entitled to a *quantum meruit*, in the same manner as if he had not been an executor: so that this was out of the common case, and to be considered as if the defendant had been employed in the nature of a bailiff, &c., for which reason it was prayed, that the Master might be directed to have regard to, and make some allowance for, the great trouble and successful pains taken by the defendant, in relation to the affairs of the testator.

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Lord Chancellor. It is an established rule, [A] (2) that a

[A] An executor in trust, who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused, but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship, and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust money in their hands, insisting, that the residuary legatees might as well make a contract with the executor touching the surplus, (which was their own property) as the testator himself; and that no harm could thereby happen to the trust estate. But the court said, all bargains of this kind ought to be discouraged, as tending to eat up the trust; and here the executor had died before he had finished the

(1) Vide *Ellison* v. *Airey*, 1 Vez. 115.

(2) So, *Scattergood* v. *Harrison*, Mos. 128. (*x*).

(*x*) *Burden* v. *Burden*, 1 V. and B. 170. *Marshall* v. *Holloway*, 2 Swan. 432. *Brocksopp* v. *Barnes*, 5 Mad. 90.: but an executor in India, no legacy being given to him, is entitled to commission upon his payments. *Chetham* v. *Lord Audley*, 4 Ves. 72.; otherwise if he has a legacy. *Freeman* v. *Fairlie*, 3 Mer. 24.

trustee, executor, or administrator, shall have no allowance for his care and trouble: the reason of which seems to be, for that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value. Besides, the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust, or not. The defendant's renouncing the executorship is not material, because he is still at (1) liberty, whenever he pleases, to accept of the executorship: otherwise, if both the executors had renounced, and the ordinary had thereupon granted administration. And if this were to make any difference, it would be an art practised by executors to get themselves out of this rule, which I take to be a reasonable one, and to have long prevailed. But further; in the present case, the testator has by his will expressly directed what should be the defendant's recompence for his trouble, in case of his refusing the executorship, (*viz.*) that he still should have the 100*l.* legacy, to which I can make no addition. However, it being a hard case, let the defendant take back the deposit. (2)

Where there are two executors, and one renounces, he is still at liberty to accept of the executorship: secus, where both renounce; though, in this matter, the common lawyers differ from the civilians, the latter holding, that a renunciation once made, though only by one of them, is peremptory. See Salk. 321. Hows & Downs *v.* Lord Petre.

affairs of the trust: wherefore the plaintiff's demand was disallowed. *Gould* v. *Fleetwood*, *Mich.* 1732, at the Rolls. And it seems to be owing to this jealousy, which a court of equity entertains of an executor or trustee, that if *they* compound debts or mortgages, and buy them in for less than is due thereon, they shall not take the benefit of it themselves, but other creditors and legatees shall have the advantage of it, and for want of them, the benefit shall go to the party who is entitled to the surplus; whereas, if one who acts for himself, and is not in the circumstances of an executor or trustee, buys in a mortgage for less than is due, or for less than it is worth, *he* shall be allowed all that is due thereon. See *Salk.* 155. Thus in the case of *Baldwin* v. *Banister*, heard at the Rolls, *Paschæ*, 1718. The case was, a mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's right of dower. Decreed, that the heir of the mortgagor, on his bringing a bill to redeem should have the benefit thereof, on this principle, that the mortgagee is but a trustee for the mortgagor after his money paid. So in the case of *Powell* v. *Glover*, *Mich.* 1721, at the Rolls, where a guardian compounded debts, decreed it should be for the benefit of the infant.

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(1) So, *Arnold* v. *Blencowe*, at the Rolls, *Jan.* 31, 1788. (*y*) Et vide *The King* v. *Simpson*, 3 Burr. 1463.

(2) Reg. Lib. B. 1732. fol. 322., and 1733. fol. 333., by which it appears, the Master of the Rolls directed generally, that all parties should have just allowances; and on appeal by the defendant *Pett*, this decree was affirmed, but the particular *gravamen* is not stated.

(*y*) 1 Cox 426.

Case 61.

Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 567. pl. 19. One devises a rent-charge to be sold to pay legacies amounting to 800*l.*, and if the rent-charge should sell for 1000*l.* the testator gives a further legacy of 200*l.* The rent-charge sells for above 800*l.* and less than 1000*l.*, what exceeds the 800*l.* shall belong to the heir as a resulting trust.

—— STONEHOUSE, ESQ. et Ux' *v.* SIR JOHN EVELYN.

THE Lady *Wyche*, seised in fee of a rent-charge of 38*l.* 16*s.* *per annum*, by her will devised this rent-charge to *Thomas Dalton*, Esq. (late Lord Chief Baron of the Exchequer in *Ireland*,) and his heirs, in trust to pay several sums to several annuitants for their lives, and after their death to pay 300*l.* to the plaintiffs, 300*l.* to *B.*, and 200*l.* to *C.*; and if the said rent-charge should sell for 1000*l.*, then the testatrix (who died soon after making her will) gave the further legacy of 100*l.* to *B.* and * 100*l.* to *C.* All the annuitants were dead, the last of whom died the 24th of *March*, 1732; and the Lord Chief Baron *Dalton*, the trustee, was dead, having left an infant son and heir. The plaintiffs brought this bill to compel a sale of the rent-charge, and to be paid their 300*l.* and interest.

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Upon opening the pleadings, the Master of the Rolls started this question: suppose the rent-charge should sell for above 800*l.* and less than 1000*l.*, which, probably, may be the case,—who will be entitled to the surplus beyond 800*l.*? To which it was answered by the counsel, that in the case supposed, as the heir was disinherited, and the other legatees had no pretence to claim more than the legacies, the monies produced by the sale, which would exceed 800*l.* and fall short of 1000*l.*, ought to be distributed in proportion to the legatees *B.* and *C.*

Cur': Nothing appears to be said in the will to that purpose; so that to admit such construction, would be to make a new will. Wherefore as to all the monies arising from the estate devised to be sold, and not disposed of by the testatrix, there must be a resulting trust for the (*a*) heir; consequently, if the rent-charge be sold for above 800*l.* and under 1000*l.*, all the monies exceeding the 800*l.* must be paid to the heir at law.

(*a*) See Cruse *v.* Barley, ante, 22.

In the next place it was insisted, that whereas these legacies were given out of a fund that yielded an (*b*) annual profit, namely, this rent-charge, the legacies ought to carry

(*b*) See Maxwell *v.* Wettenhall, vol. 2. 26.

interest from the death of the surviving annuitant, who died on the 24th of *March*, 1732.

STONEHOUSE v. EVELYN. [254]

Cur' : The legacies ought to carry interest from that time : but then it must be only in proportion to what the rent-charge brings in, not more ; and if there be a surplus beyond the interest, that must go to the heir at law. And with regard to the heir at law of the trustee, who is an infant, he being but a bare trustee, is to convey according to the late statute of 7 *Anne, cap.* 29. (1)

A legacy out of a rent-charge shall carry interest.

Lastly, in proving this will (it being a will disposing of a real estate) the proof was full, that the three subscribing witnesses did subscribe their names in the presence of the testatrix : but one of them said, he did not see the testatrix sign, but that she owned, at the same time the witnesses subscribed, that the name signed to the will was her own handwriting ; which his Honour held, without all doubt, to be sufficient. (*x*) And I, having the same day occasion to speak with Mr. Justice *Fortescue Aland*, mentioned this to him, who said, it was the common practice, and that he had twice or thrice ruled it so upon evidence on the circuit ; and that it is sufficient, if one of the three subscribing witnesses (*y*) swears the testator acknowledged the signing to be his own handwriting. And it is remarkable, that the statute of frauds does not say, the testator shall sign his will in the presence of three witnesses, but requires these three things :—*First*, That the will should be in writing ; 2*dly*, That it should be signed by the testator ; and, 3*dly*, That it should be subscribed by three witnesses in the presence of the testator. (2)

Where the testator owns his hand before the witnesses, who subscribe the will in the testator's presence ; the will is good, though all the witnesses did not see the testator sign the will.

(1) Reg. Lib. B. 1733. fol. 168.

(2) Vide *Longford* v. *Eyre*, ante, 1 vol. 741.

(*x*) *Ellis* v. *Smith*, 1 Ves. Jun. 11. *Addy* v. *Grix*, 8 Ves. 504. *Westbeech* v. *Kennedy*, 1 V. & B. 362.

(*y*) At law, a will may be read on proof by one witness, on the supposition that there are two others, who could be allowed to give the same testimony : *Holdfast* v. *Dowsing*, 2 Stra. 1254. : but equity requires all the three witnesses to be examined ; *Ogle* v. *Cook*, 1 Vez. Sen. 177. *Townsend* v. *Ives*, 1 Wils. 216. *Bootle* v. *Blundell*, 19 Ves. 494. S. C. Coop. 136. *Wood* v. *Stane*, 8 Price 613. ; except in cases of insanity, or absence abroad, *Lord Carrington* v. *Payne*, 5 Ves. 411. *Bernett* v. *Taylor*, 9 Ves. 381. *Bootle* v. *Blundell*, 19 Ves. 505.

Case 62.

GIBBS *v.* COLE.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 14. pl. 2. Affidavits allowed to be read for the patentee of a new invention, on a motion to dissolve an injunction on coming in of the answer. Where there is a grant of a new invention by patent, a small variation of the invention will not entitle another to break in upon the patent. So in the case of a grant of the sole printing of a book to the author, who takes whole paragraphs from another book, this not material: for it may be necessary to introduce what is new.

J. S. had a patent granted to him by the Crown, for the sole printing and selling a book of architecture, intituled, *Gibbs's Designs*. Upon filing the bill, the plaintiff, the patentee of this new book, obtained an injunction against the defendant, who had printed the same; and on coming in of the answer, it being moved to dissolve the injunction, affidavits were allowed (1) to be read, in order to support the

(1) Reg. Lib. A. 1733. fol. 338. And in *Countess of Strathmore* v. *Bowes*, before Sir *L. Kenyon*, Master of the Rolls, sitting for the Lord Chancellor on the 11th of *July*, 1786,(*x*) a motion to dissolve an injunction to stay waste was made under similar circumstances; his Honour had directed the motion to stand over, that precedents might be found, where the court had permitted affidavits to be read in support of the injunction after answer; and on this day the counsel for the plaintiff mentioned *Gibbs* v. *Cole*, sup. *Ryder* v. *Bentham*, *Aug.* 1750. *Attorney-General* v. *Bentham*, *July* 1755, in all which the same thing had been done. His Honour said he thought, as well on the precedents, as on the reason of the thing, that the proceeding was proper: but as it so materially concerned the practice of the court, he would not decide the point without consulting the Lord Chancellor. Afterwards the defendant *consented* that the affidavits should be read, and they were read accordingly. Et vide *Isaacs* v. *Humpage*, 3 Bro. C. C. 463., and 1 Ves. Jun. 427. S. C. (*y*)

(*x*) 1 Cox 263. S. C. 2 Dick. 673. and 2 Bro. C. C. 90.

(*y*) The authority of *Isaacs* v. *Humpage* has been denied in later cases, *Hanson* v. *Gardiner*, 7 Ves. 308. *Berkeley* v. *Brymer*, 9 Ves. 355. *Smythe* v. *Smythe*, 1 Swan. 252. Affidavits are only read in opposition to an answer to prove the facts of waste or mismanagement, never to prove the plaintiff's title; *Packington* v. *Packington*, 1 Dick. 101. *Berkeley* v. *Brymer*, ub. sup. *Norway* v. *Rowe*, 19 Ves. 144. *Lawson* v. *Morgan*, 1 Price 303. *Morphett* v. *Jones*, 19 Ves. 350. *Hodgson* v. *Dean*, 2 S. & S. 223.; and affidavits filed after answer, cannot be used to obtain an injunction, but only to support one obtained before answer: *Sommerville* v. *Buckler*, 3 Anst. 658. *Lawson* v. *Morgan*, ub. sup. *Smythe* v. *Smythe*, ub. sup. *Jefferys* v. *Smith*, 1 J. & W. 298. *Glassington* v. *Thwaites*, 1 S. & S. 134.: but they may be read to support facts alleged in the bill, and not admitted or denied by the answer; *Taggart* v. *Hewlett*, 1 Mer. 499. *Morgan* v. *Goode*, 3 Mer. 10. *Jefferys* v. *Smith*, ub. sup.; and where affidavits have been filed in support of a motion which stands over, and an answer is

injunction, on account of the great prejudice that would accrue to the party, were the injunction to be dissolved, and the book allowed to be dispersed and sold by the defendant.

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And in this case it was held by the court, that a small variation of the invention would not entitle the defendant to break in upon the patent, in regard, at that rate, any grant of a patent for the like purpose might be frustrated. So, though in this book, the sole printing whereof was granted by patent to the plaintiff, some whole paragraphs appeared to be taken out of former authors; this was thought not material; for it might be necessary, in order to the introducing of what is new. Wherefore the injunction was continued.

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put in before it is again brought on, such affidavits may be read. *Morphett* v. *Jones*, ub. sup. *Goodman* v. *Whitcomb*, 1 J. & W. 591. *Glassington* v. *Thwaites*, ub. sup.

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Case 63.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 163. pl. 25. Though a bill in equity lies to recover a small quit-rent, yet it ought to appear that the plaintiff has no remedy for the same at law.

THE plaintiff *Holder*, lord of the manor of *Bathampton*, in *Somersetshire*, brought this bill against the defendant, for the arrears of a quit-rent of 7*s. per annum*, due to him as lord of the manor; and another part of his bill was to hold a large down belonging to his manor, discharged of the claim of common, which the defendant had upon the said down.

The plaintiff did not shew any difficulty which hindered him from recovering the quit-rent at law, but said, that his right thereto would appear by the writings in the defendant's custody.

The defendant by his answer said, he did not believe the rent was due, but was willing to give it up, and pay it and the arrears, if he might quietly enjoy his common; representing withal, that he was but a poor tenant of the manor, and could not bear the expense of a suit for the quit-rent, which in a small time would come to much more than the inheritance of the rent was worth; that he had offered to shew all his deeds, and refer it to any two indifferent persons: but that the plaintiff had threatened to ruin him, and to spend 500*l.* for that purpose.

HOLDER *v.* CHAMBURY.

By the plaintiff's proofs it appeared plainly, that this 7*s.* *per annum* quit-rent was due, and had been regularly paid, till 1718, and that it was payable at *Lady-day* and *Michaelmas* in respect of the defendant's lands held of the manor; and no difficulty appeared by the plaintiff's bill, as to the describing or abutting the land.

Lord of a manor brings a bill against a tenant to hold a down belonging to the manor, discharged of the tenant's claim of a right of common thereto; this an improper bill. But a bill for a quit-rent may be proper in some circumstances and what.

Lord Chancellor. The bill, with respect to the plaintiff's holding his down discharged of the defendant's claim of common thereon, is improper; for by the same reason the plaintiff may bring a separate bill against every tenant of his manor who shall set up the like claim. (1) As to such other part of the bill as would recover the quit-rent; there may be indeed a case so circumstanced, as to make a bill of that kind proper, as where the lands out of which it is claimed are wholly uncertain, (2) and where the days, on which the same is payable, are also uncertain: but then these things ought to be laid in the bill, else a lord may be very vexatious to a tenant, and make him spend in his own necessary defence more than three times the value of the rent. Here it is hard for the defendant, when he does not know the plaintiff's title to the quit-rent, to admit his inheritance to be for ever liable thereto. The bill appears to be merely for vexation: for the plaintiff might have had a plain and easy way to have recovered the quit-rent without this expensive method, *(viz.)* by a distress; and it is proved he has harassed the defendant with frequent distresses, and would not, after the defendant had replevied, proceed to an avowry. However, I do not see it will be for the defendant's benefit to dismiss the bill as to this quit-rent; for then the plaintiff will immediately sue for it at law.

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In a poor cause, to save expense, and where the matter is clear, the court will refer it to the Register, instead of a Master, to compute the interest, or arrears of rent.

Wherefore, since it appears here that the quit-rent has been paid to *Michaelmas*, 1718, let the Register, not the Master, compute the arrears of the quit-rent from *Michaelmas*, 1718, to this time; and let the plaintiff's right to the rent

(1) Vide *Disney* v. *Robertson*, Bunb. 41. *Mayor of Boston* v. *Jackson*, Bunb. 101. *Mayor of York* v. *Pilkington*, 1 Atk. 282. *Lord Teynham* v. *Herbert*, 2 Atk. 483. *Bouverie* v. *Prentice*, 1 Bro. C. C. 200.(*x*) 148. *Duke of Bridgewater* v. *Edwards*, 4 Bro. P. C. 139. *Bouverie* v. *Prentice*, 1 Bro. C. C. 200. *Duke of Leeds* v. *Powell*, 1 Vez. 171. *Duke of Leeds* v. *Corporation of New Radnor*, 2 Bro. C. C. 338, 518.

(2) *North* v. *Earl of Strafford*, ante,

(*x*) And see *Cowper* v. *Clerk*, ante, 157. n. 1.

be established, but without costs. The bill to be dismissed with costs as to all the residue. (3)

HOLDER *v.* CHAMBURY.

(3) Reg. Lib. A. 1733, fol. 394.

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Case 64.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 294. pl. 22. Devise of a term to A. for life, remainder to such children as the testator shall leave at his death; and if all his children die without leaving issue, then to B. The children die without leaving any issue living at the time of their death; this a good devise over to B.

EDWARD BAXTER, possessed of a term for forty years held of the church of *Carlisle*, by his will dated the 12th of *September*, 1732, devised the premises to trustees, in trust to apply the rents and profits to keep the premises in repair, and to renew as often as there should be occasion; and then in trust to pay the overplus thereof to the testator's wife *Sarah* for her life, if she should so long continue a widow, and after her death, or second marriage, to the use of such children as the testator should leave at the time of his death, equally amongst them; and in case any of his said children should die without leaving any issue, the share of him or her so dying to go to the survivor or survivors of them; and in case all his said children should die without leaving any issue, then to the use of *John Hutchinson*. The testator made his daughter *Mary* sole executrix, and died, leaving one daughter, who afterwards died without leaving issue at her death; and whether the devise over to the said *John Hutchinson* was good, was the question?

Mr. *Verney* insisted, that the same was void; and that, though this was the devise of a trust, yet it must be construed as a legal estate, and as it stood originally in the will, without being assisted or made good by any subsequent accident; that it might be laid down as a rule, that where the words of a will, in the case of a real estate, are sufficient to give an estate-tail, there the same words, when applied to a term for years, will convey the entire interest in such term: now here could be no doubt but that, had the testator been seised of lands in fee, instead of the term, and devised them in this manner; the first devisee [the daughter] would have been tenant in tail; and this was the stronger, for that the first devise, after the death or second marriage of the testator's wife, is to such children *as the testator should leave*

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at the time of his death, which words were afterwards dropped: and from whence could proceed that change of the testator's expression, but from a change of his intention? Besides, here was a possibility upon a possibility, under which Mr. *Hutchinson,* the last devisee over, claimed; and therefore it could not be good.

The devise of a trust to be construed in the same manner as that of a legal estate, and not to be varied by subsequent accidents.

Lord Chancellor. I admit the devise of a trust must have the same construction as that of a legal estate, and that accidents subsequent to the making of the will, shall not any ways affect such construction: and further, that though the intention of the testator is greatly to be regarded, yet this his intention must ever be consistent with the rules of law. But then the rule which has been insisted on, that whatever words of a will in the case of a freehold will create an entail, the same, when made use of with respect to a term, will pass the absolute interest in such term: this rule (I say) seems to be laid down in too great a latitude. So far indeed may be agreed, that where the words of a will, when used with regard to a *freehold, give an express estate-tail, there the same words applied to a term will pass the whole interest in such term: as if a term for years be devised to *A.* and the heirs of his body, remainder to *B.*, in such case the remainder is void. So if the devise of a term were to *A.* for life, remainder to the heirs of his body, remainder over to *B.*, such remainder to *B.* would be void, *causâ quâ supra.*

Where the words of a devise of a leasehold would make an express estate-tail in the case of a freehold, there a devise over of such leasehold is void; secus, if the words in the former devise would, in the case of a freehold, make an estate-tail only by implication.

But in the principal case, the words of the will would, if used with respect to a freehold or real estate, pass an entail only by construction and implication; and that these should carry the absolute interest in the term is no necessary consequence. Where words are capable of a two-fold construction even in the case of a deed, (and much more of a will) it is just and reasonable that such construction should be received as tends to make it good; and in the principal case, the devise of the term to the testator's children, and if they should die without leaving any issue, then to *Hutchinson,* may easily and naturally be understood to signify, if they die without leaving any issue at the time of their death; nay, much more naturally than in the other case, *(viz.)* if there should be a failure of issue of them a hundred years hence. The reason given in the case of *Target* v. *Gaunt,* reported in the *Abridgment of Cases in Equity,* 193. (*a*) is very strong in support of this devise over, which in effect was: one possessed of a term for years, devised it to his son *A.* if the

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(*a*) Vol. 1. 432.

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term should so long continue and no longer, and after his death to such of his issue as he should devise it to, and if *A.* should die without issue, then to his (the testator's son) *B.* *A.* died without issue, and without making any disposition of the term; and the question being whether *B.* the younger son was entitled, it was decreed in his favour; for that the [261] words *dying without issue* have a two-fold meaning: the one to signify a dying without issue at the time of one's death, the other a dying without issue, whenever such issue fails; and though, where lands of inheritance are devised to *A.*, and if he die without issue, then to *B.*, an estate tail will pass to *A.* by implication, in order to comprehend the issue to all succeeding generations; yet in the case of a term for years which cannot possibly descend to issue, there is no necessity to make such a construction; for which reason, the most obvious and natural sense shall there take place, and the devisor be presumed to have meant, if *A.* the first devisee die without issue living at his death; consequently, the dying without issue being confined to a life, makes the limitation over good, by way of executory devise. (*a*) So the case of *Forth* v. *Chapman* seems to be in point, where one possessed of a term for years, devised it to *A.* for life, and if *A.* died leaving no issue, then to *B.* It is true, the Master of the Rolls (Sir *Joseph Jekyll)* was of opinion and decreed, that the devise over to *B.* was void; but on an appeal, the Lord Chancellor *Parker* held it good, for that there can be no difference between the words *without leaving issue,* (which is construed to mean (*b*) issue at his death) and *leaving no issue.* Farther what made it infinitely stronger, was, that the fact happened to be (though this was not observed by the counsel in that case) that the testator had a real and lease-hold estate, and devised all (*c*) his estate, as well freehold as goods and chattels, to *A.*, and if *A.* died leaving no issue, then to *B.;* and there the same words in the same will were construed to make the several devises good, and to give the [262] first devisee an estate-tail in the freehold, and but an estate during his life in the leasehold.

(*a*) Vol. 1. 663.

(*b*) See vol. 1. 198. Nicholls *v.* Hooper and Pinbury *v.* Elkin, 563.

(*c*) Vol. 1. 667.

Wherefore in the principal case the intention of the testator being plain, that if *A.* died, and left no issue, the devise over should take effect, the Lord Chancellor, in compliance with such intention, and also agreeably to the precedents in point, decreed in favour of the devisee over, *viz.* that the words, if the first devisee died without leaving any issue,

ATKINSON v. HUTCHINSON. must be intended to mean, without leaving issue at his death. (1)

(1) Reg. Lib. A. 1733. fol. 703. Vide *Nicholls* v. *Hooper*, ante, 1 vol. 198. *Target* v. *Gaunt*, ante, 1 vol. 432. *Pinbury* v. *Elkin*, ante, 1 vol. 563. *Forth* v. *Chapman*, ante, 1 vol. 663. *Pleydell* v. *Pleydell*, ante, 1 vol. 748. *Maddox* v. *Staines*, ante, 2 vol. 421. *Balguy* v. *Hamilton*, Mos. 186. *Attorney-General* v. *Hall*, Kel. 13. *Sabbarton* v. *Sabbarton*, Ca. temp. Tal. 55 & 245. *Beauclerk* v. *Dormer*, 2 Atk. 308. *Saltern* v. *Saltern*, 2 Atk. 376. *Sheffield* v. *Lord Orrery*, 3 Atk. 287. *Trafford* v. *Boehm*, 3 Atk. 449. *Lampley* v. *Blower*, 3 Atk. 396. *Chamberlain* v. *Jacob*, Amb. 72. *Earl of Stafford* v. *Buckley*, 2 Vez. 181. *Exel* v. *Wallace*, 2 Vez. 120, 318. *Sheppard* v. *Lessingham*, Amb. 122. *Bodens* v. *Watson*, Amb. 398, 478. *Keily* v. *Fowler*, 6 Bro. P. C. 309. *Grey* v. *Montagu*, 6 Bro. P. C. 429. *Earl of Chatham* v. *Tothill*, 6 Bro. P. C. 450. *Attorney-General* v. *Hird*, 1 Bro. C. C. 170. *Bigge* v. *Bensley*, 1 Bro. C. C. 187. *Wicker* v. *Mitford*, 1 Harg. Law Tracts, 513. *Glover* v. *Strothoff*, 2 Bro. C. C. 33. *Doe* v. *Lyde*, 1 T. R. 593. *Goodtitle* v. *Pegden*, 2 T. R. 720. *Knight* v. *Ellis*, 2 Bro. C. C. 570. *Porter* v. *Bradley*, 3 T. R. 143. *Hockley* v. *Mawbey*, 3 Bro. C. C. 82, and 1 Ves. Jun. 143. S. C. (*x*)

(*x*) *Bodens* v. *Lord Galway*, 2 Eden 297. *Daintry* v. *Daintry*, 6 T. R. 307. *Wilkinson* v. *South*, 7 T. R. 555. *Roe* v. *Jeffery*, ib. 589. *Doe* v. *Cooke*, 7 East. 299. *Everest* v. *Gell*, 1 Ves. Jun. 286. *Chandless* v. *Price*, 3 Ves. 99. S. C. 13 Ves. 479 n. *Rawlins* v. *Goldfrap*, 5 Ves. 440. *Ex parte Sterne*, 6 Ves. 159. *Crooke* v. *De Vandes*, 9 Ves. 197. *Boehm* v. *Clarke*, 9 Ves. 580. *Tenny* v. *Agar*, 12 East. 253. *Barlow* v. *Salter*, 17 Ves. 479. *Dansey* v. *Griffiths*, 4 M. & S. 61. *Donn* v. *Penny*, 1 Mer. 20. S. C. 19 Ves. 545. *Stratford* v. *Powell*, 1 Ba. & Be. 1. *Lyon* v. *Mitchell*, 1 Mad. 467. *Tothill* v. *Pitt*, ib. 488. *Murthwaite* v. *Barnard*, 2 Brod. & B. 623. *Murthwaite* v. *Jenkinson*, 2 B. & C. 358. S. C. 3 B. & C. 191. And see 2 Saund. 388. n. 9. The result of these cases appears to be, that whether the subject is real or personal estate, unless there are expressions or circumstances from which it can be collected that these words, *die without issue*, are used in a more confined sense, they are to have their legal signification, *viz.* death without issue generally; *Barlow* v. *Salter*, ub. sup.; that in the case of a devise of real estate the words *without leaving issue* bear the same sense as *without issue; Dansey* v. *Griffiths*, ub. sup.; but that in the case of a bequest of personal estate those words are construed, without leaving issue living at the death of the party, to the failure of whose issue the words relate, *Crooke* v. *De Vandes*, 9 Ves. 204.

Case 65.

LOW *v.* BURRON.

Lord Chancellor TALBOT. THE bill was for an account of the rents and profits of divers messuages and lands in *Warrington*, in *Lancashire*, on this

2 Eq. Ca. Ab. 394. pl. 1. An estate pur autre vie may be limited to A. in tail, remainder to B., for this is only a description, who shall take as special occupants during the life of cestui que vie.

case: *John Casson*, seised of an estate for three lives in the premises, by his will dated the 12th of *January*, 1684, devised them to his daughter *Mary Mollineux* for life, remainder to her issue male, and for want of such, remainder to one *Low*, under whom the plaintiff claimed. *Mary Mollineux*, by lease and release conveyed the premises, in consideration of her marriage with *Edward Burron*, to the use of herself and her intended husband, and the heirs of their bodies, remainder to the heirs of her husband *Burron*. In 1705 *Mary* died without issue; and the plaintiff, claiming under the person in remainder, now brought this bill for an account of the rents and profits.

The questions were, first, One having an estate for three lives, and devising it to *A.* in tail, remainder to *B.*, whether this remainder was good? Secondly, supposing it to be good, whether *A.* by such lease and release could bar it? [263]

As to the first, it was said, and so agreed by the court, that the limitation of an estate *pur autre vie* to *A.* and the heirs of his body, makes no estate tail in *A.*; for all estates tail are estates of inheritance, to which dower is incident, and must be within the statute *De Donis;* whereas, in this kind of estate, which is no inheritance, there can be no dower, neither is it within the statute, but a descendible [B] freehold only.

Also the Lord Chancellor held plainly, that this was a [C]

[B] For which reason it has been determined, that where a lease for three lives has been granted to a man and his heirs, and such grantee died, leaving an infant heir, the parol should not demur. By the Lord *Talbot*, in another branch of the cause of *Chaplin* v. *Chaplin*, 18th *July*, 1735. Vide post. 368.

[C] The objection against this remainder being good is,—for that when the lessee had devised the premises in tail he then had nothing left in him but a possibility, which he could not devise or limit over; as if a man were seised in fee-simple, and at common law had granted lands to one and the heirs of his body, this was a conditional fee; and forasmuch as the donor had only a possibility of reverter, he could not limit it over. Now, if at common law an estate in fee could not be limited over after an estate given to one and the heirs of his body, much less should an estate for three lives be limited over after such a failure of issue. And as to the notion that in this kind of limitation the heirs of the body of *A.* take only as special occupants, and that a man may name as many special occupants as he pleases; by the same reason it may be argued that this estate for lives may be limited to *A.* and his heirs; and if *A.* die without heirs, then to *B.* and his heirs, which certainly would be a void limitation to *B.*; and in presumption of law, the continuance of the issue of a man's body may be for ever. From whence it should seem that after the lessee for three lives has granted or devised the premises to *A.* and the heirs of his body, he (the lessee,) has nothing but a possibility, which he cannot grant or limit over. Note. This appears from the Reporter's MS. to have been the opinion of Mr. *Webb*, an

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(*a*) See Chaplin *v.* Chaplin, post. 368.

good (1) remainder to *B.* on *A.*'s death without issue, it being no more than a(*a*) description who should take as special occupants during the lives of these three *cestui que vies.* As if the grantor had said, "instead of a wandering right of[D] "*general* occupancy, I do appoint, that after the death of "*A.* the grantee, they who shall happen to be heirs of the "body of *A.* shall be *special* occupants of the premises; "and if there shall be no issue of the body of *A.*, then *B.* "and his heirs shall be the special occupants thereof." And that here can be no danger of a perpetuity; for all these estates will determine on the expiration of the three lives.

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So, if instead of three, there had been twenty lives, all spending at the same time, all the candles lighted up at once, it would have been good; for, in effect, it is only for one

eminent conveyancer, late of the *Inner Temple.* However, the law is settled as above.

[D] It is observable, that at law there could be no *general* occupant of a rent: as if I had granted a rent to *A.* for the life of *B.*, and *A.* had died, living *B.*, the rent would have determined. 2 *Roll. Abr.* 150. *Salk.* 189. But there might have been a *special* occupant of a rent. As if I had granted a rent to *A.* and his *heirs* for the life of *B.*, and *A.* had died, living *B.* and leaving an heir; such heir would have been a special occupant. Yet, if a man had granted a rent to *A.*, his executors and assigns, during the life of *B.*, and afterwards the grantee had died, leaving an executor, but no assignee, the executor should not have had the rent, in regard it being a freehold, the same could not descend to an executor. *Mo.* 664. 2 *Roll. Abr.* 152. 3 *Car. Sir Richard Buller et al'* v. *Chiverton*, agreed and admitted by *Jones* Justice *et Cur'*, and by the counsel on both sides, that the rent is extinct; though there seems to have been no sound reason for this distinction. But as to rents granted *pur autre vie*, the statute of frauds and perjuries has made an alteration; for by that statute, any estate *pur autre vie* is made devisable, and if not devised away, shall be assets in the hands of the heir, if limited to that heir; if not limited to the heir, it shall go to the executors or administrators of the grantee, and be assets in their hands. So that, if since that statute a rent be granted to *A.* for the life of *B.*, and *A.* die, living *B.*, *A.*'s executors or administrators shall have it during the life of B., for the statute is not only made to prevent the inconvenience of scrambling for estates, and getting the first possession after the death of the grantee, but likewise for preserving and continuing the estate during the life of the *cestui que vie;* and it is reasonable, since the grantee might by deed have disposed of the rent during the life of the *cestui que vie*, that, though by his dying without having made any such disposition, in nicety of law this estate would have determined; yet, by the statute, that interest which passed from the grantor ought to be preserved, and shall go to the executors or administrators of the grantee during the life of the *cestui que vie.* And the statute in this case does not enlarge, but only preserves, the estate of the grantee. By the Lord Keeper *Harcourt*, in the case of *Rawlinson* v. *The Duchess of Montague et al'*, 4th *December*, 1710, though this was not the principal point.

(1) *Finch* v. *Tucker*, 2 Vern. 184.

life, *viz.* that which shall happen to be the survivor. For which reason it were very improper to call this an estate tail, since at that rate it would not be liable to a forfeiture, or punishable for waste, the contrary whereof is true.(*a*)

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(*a*) 6 Co. 37. 2 Roll. Abr. 826. 1 Inst. 54.

2*dly*, The Lord Chancellor said, that though by a lease, or by a lease and release, *A.* might bar the heirs of his body, as in some respect claiming under him, yet he inclined to think *A.* could not bar the remainder over to *B.*, who was in the nature of a purchaser, and would be no way subject to the incumbrances of *A.* any more than if the estate *pur autre vie* had been limited to *A.* for life, remainder to *B.* for life; in which case plainly *A.* could not bar *B.* especially by this conveyance of lease and release, which never transfers more than may lawfully pass: whereas the conveying away or barring the remainder limited to *B.* (admitting it to have been a good remainder) is doing a wrong to *B.*, and depriving him of an estate which was before lawfully vested in him. Nay, indeed, it seemed to him as if no act which *A.* could do would be capable of barring this limitation over to *B.*, in regard there could be no common recovery suffered thereof, it being only an estate for lives; and his Lordship said, that this (as he remembered) was determined in the case of Sir *Hardolph Wasteneys* (1) in the House of Lords, upon an appeal from this court.[E]

An estate for three lives is limited to A. and the heirs of his body, remainder to B. A. by lease, or by lease and release, may bar the heirs of his body, as claiming under him, but cannot by any act bar B. Quær' tamen.

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[E] The following case has been taken from the Register's Book:—
The late Earl of *Arlington* devised, *int' al'*, a leasehold estate, being the manor of *Totten-hall*, alias *Tottenham Court*, in *Middlesex*, and held for three lives of the cathedral church of *St. Paul*, *London*, to the Duchess of *Grafton*, his only issue, for life, remainder to the Duke of *Grafton*, for life, remainder to the first and every other son of the Duke by the Duchess in tail male, remainder to the heirs female of the Duke by the Duchess in tail, remainder to the right heirs of the Duchess. Afterwards, in 1686, the said lease was renewed agreeably to the above limitations. The Duke of *Grafton* died, and his son, the pre-

(1) *Wastneys* v. *Chappell*, 1 Bro. P. C. 457. But it seems now, that any alienation by the (*quasi*) tenant in tail will be sufficient to bar the remainderman, although, if no such act be done, the remainderman will still take as special occupant. *Baker* v. *Bayley*, 2 Vern. 225. *Norton* v. *Frecker*, 1 Atk. 524. *Forster* v. *Forster*, 2 Atk. 259. *Saltern* v. *Saltern*, 2 Atk. 376. *Williams* v. *Jekyl*, 2 Ves. 681. *Blake* v. *Blake*. (*x*)

(*x*) 1 Cox 266. *Blake* v. *Luxton*, 6 T. R. 289. Coop. 178. 1 Sch. & Lef. 294. *Ex parte Sterne*, 6 Ves. 156. *Ripley* v. *Waterworth*, 7 Ves. 425. *Campbell* v. *Sandys*, 1 Sch. & Lef. 288. *Grey* v. *Mannock*, 2 Eden 339. *Dillon* v. *Dillon*, 1 Ba. & Be. 95; and in the above cases it is decided that a disposition by will does not bar the remainders.

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However the statute of limitations being pleaded, where B.'s right accrued above 30 years since, though the case may be so circumstanced as that the plaintiff, notwithstanding he could not bring an ejectment, might bring a bill in equity, yet the court will not assist a stale demand against a long and quiet possession.

But notwithstanding all this, yet, it appearing that the right of the plaintiff, and of those under whom he claimed, had accrued so long since as the year 1705, now near thirty years ago, during all which time the * defendant's possession had been unmolested, and the statute of limitations being pleaded, (though it was urged, that the plaintiff had not the lease in his possession, and that the defendant in his plea had set forth, that the lease had been renewed: and though it was moreover insisted, that however the plaintiff might be disabled from bringing an ejectment, he might yet bring a bill in equity;) the Lord Chancellor declared, he would grant no relief in the case of so stale a demand, and therefore allowed the plea.(1)

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sent Duke, brought his bill, praying that the leasehold premises (some of the lives whereby the same were held being dropped) might be renewed and settled on the Duchess for life, remainder to the plaintiff the Duke, and his heirs; for that otherwise it would tend to a perpetuity. The Lord *Euston*, (the Duke's eldest son,) was then an infant of seven years of age; and the cause being heard the 2d of *August* 1722, the court conceived that they could not do it till a fine *sur concesserunt* had been levied by the plaintiff, the Duke of *Grafton*, and the defendant Sir *Thomas Hanmer*, (who had married the Duchess,) and the Duchess of *Grafton;* and the matter was referred to a Master; and it coming on afterwards, 21st *December* 1722, on the report, by which it appeared that a fine had been levied, and that the Master had settled a lease and release, being an assignment of the lease of 1686 to new trustees, thereupon the Lord Chancellor *Macclesfield* ordered that the said lease and release should be executed, and that the new lease should be to these new trustees, in trust for the Duchess for life, remainder to the plaintiff the Duke, and his heirs, during the lives in the lease. *Duke of Grafton* v. *Hanmer*. And indeed it seems reasonable, that the first tenant in tail (improperly so called) should be allowed to bar the limitations over; for though the original estate be only for three lives, yet, it being the interest of both landlord and tenant that the leases should be renewed, and it being the doctrine of the Court of Chancery that all such new leases are subject to the old trusts, the estate might by this means continue for ever, without any possibility of being barred. See also *Baker* v. *Bailey*, 2 Vern. 225.

(1) Reg. Lib. B. 1733. fol. 334.

3 Eq 400.
1 Ch. ap. 209.
1 Eq. Cas. 238.
2 Ch. 631.
33 Ch. D. 327.
1922-2 Ch 751.

BEWICK *v.* WHITFIELD.(1)

Case 66.

[*See a Branch of this Cause*, Vol. 2. 240.]

Lord Chancellor Talbot.

A. tenant for life, remainder to B. in tail, as to one moiety, remainder to C. an infant in tail, as to the other moiety, remainder over: there is timber on the premises greatly decaying; B. the remainderman, brings a bill, praying, that the decaying timber might be cut down, sold, and the money divided betwixt him and the infant; and the tenant for life insists to have part of the money; tenant for life must have sufficient left for repairs, &c. and an allowance for all damage done to him on the ground; but to have no allowance for the timber, which, when severed by accident, or by a trespasser, belongs to the first owner of the inheritance. Decaying timber, if for ornament or safety, not to be cut down. Also where an infant is interested in the inheritance, no timber can be cut down, but by the approbation of the Master: and the infant's moiety of the money to be put out for his benefit.

A. was tenant for life, remainder to *B.* in tail, as to one moiety, remainder as to the other moiety to *C.* an infant in tail, remainder over. There was timber upon the premises

(1) The estates, upon which the timber in question in this cause grew, were settled to the use of the grantor for life, and (after several prior limitations) to the use of *Robert Bewick* for his life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, with like remainder to *Joseph*, *Calverly*, and *Benjamin Bewick*, and their first and other sons, remainder to *Jane Bewick* and *Barbara Ramsay*, (sisters of the grantor) and the heirs of their bodies, remainder to the right heirs of the grantor. The bill in this cause was filed by *Robert Bewick the tenant for life*, and *Robert Bewick* his infant son. The defendants were, *Utrick Whitfield*, and *Philadelphia* his wife, and the said *Calverly Bewick*: but it does not appear by Reg. Lib. what interests *Whitfield* and his wife had in the premises. After stating the settlement, and the determination of the several estates prior to the estate for life of *Robert Bewick* the father, and that the plaintiff *Robert Bewick* the father was become seised of the estates for his life, and the plaintiff *Robert Bewick* the son was become entitled to an estate tail in remainder expectant on the determination of that estate for life, and that the said *Joseph Bewick* and *Benjamin Bewick* were dead: the bill proceeded to state there were great quantities of oak, ash, and other timber trees growing on the said premises, the greatest part whereof were so very old, that they were going very much to decay, and, if permitted to stand, would grow every year of much less value, and if cut down, would be of considerable advantage to the persons entitled to the inheritance of the said premises; that the plaintiff *Robert Bewick* the son was an infant of only three years old, and therefore could give no directions for cutting such timber; that the defendants insisted, that by a decree made in two former causes in this court, dated the 8th of *October*, 1724, the plaintiffs were restrained from committing waste upon the said premises, whereas that decree ought not to be objected to the plaintiffs, by reason that the greatest

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greatly decaying; whereupon *B.* the remainderman brought a bill, praying, that the timber that was decaying might be cut down, and that the plaintiff the remainderman in tail, together with the other remainderman, the infant, might have the money arising by the sale of this timber. On the other hand, the tenant for life insisted to have some share of this money.

[268] *Lord Chancellor.* The timber, while standing, is part of the inheritance [F]; but whenever it is severed, either by the act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it; and this was so decreed upon occasion of the great windfall of timber on the *Cavendish* estate.(1)

[F] *A.* tenant for years, remainder to *B.* for life, remainder to *C.* in fee; *A.* is doing waste; *B.*, though he cannot bring waste, as not having the inheritance, yet he is entitled to an injunction. See 1 Roll. Abr. *Roswell*'s case, 377.(*x*) But if the waste be of a trivial nature, and *a fortiori*, if it be meliorating waste, as by building on the premises, (see 1 Inst. 53.) the court will not injoin; nor if the reversioner or remainderman in fee be not made a party, who possibly may approve of the waste. By the Lord *King*, *Mollineux* v. *Powell*, *Paschæ*, 1730.

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part of the said timber trees were going to decay, and would grow worse every year; and the bill therefore prayed that the plaintiff *Robert Bewick* the father might be empowered to cut down and sell such timber trees as were decaying or at their full growth and fit to be cut, *for the benefit of the plaintiff Robert the infant*, and so from time to time as there should be occasion *for the benefit of the said infant.*—The defendants *Whitfield* and his wife by their answer admitted many of the trees to be in a state of decay: but insisted that some of them had been planted for ornament; and they hoped the court would take care as well of their interest in the premises, as of such money as should arise from the sale of the timber which the plaintiff the father should be authorized to cut and sell. The defendant *Calverly Bewick* said that there were several timber trees on the said premises at their full growth, and others going to decay, and apprehended that it would be for the benefit of every one interested in the premises to have such, as were decayed, or going to decay, cut down; and he was willing that the same should be cut down and sold by the direction of the court, provided the money arising thereby should be secured, and put out at interest for the benefit of the persons, who should be entitled to the inheritance of the said premises.—So that it appears from the pleadings, that the tenant for life, so far from claiming any share of the money, was co-plaintiff with the infant tenant in tail in a bill praying to have the money secured *for the benefit of the infant.*

(1) But yet where the tenant for life has also in himself the next existent estate of inheritance, subject to intermediate contingent remainders, he shall

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(*x*) *Perrot* v. *Perrot*, 3 Atk. 94. *Davis* v. *Leo*, 6 Ves. 784.

2*dly*, As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber;(z) but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage is done to the tenant for life on the premises by him held for life, the same ought to be made good to him.

3*dly*, With regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance, that it should be cut down, otherwise it would become of no value;

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not take advantage of his own wrong in cutting down timber, but the court will preserve it for the benefit of the contingent remainder-men. *Williams* v. *Duke of Bolton*, *Feb.* 24, 1784. The Duke was tenant for life with contingent remainders to his first and other sons, remainder to Mrs. *Orde* for life, remainder to her first and other sons, with other contingent remainders over, (with estates to trustees to preserve all the contingent remainders) remainder to the Duke in fee.—Mrs. *Orde* had a son born, who died in a few days after his birth. All the contingent remainders being yet in expectancy, the Duke cut down timber. Mrs. *Orde* had afterwards another son, who was a defendant in the cause. On the question, to whom this timber should belong, the Lord Chancellor was of opinion, that as it was not competent for the Duke to cut down timber in respect of his life estate, he should not take advantage of his own wrong—that the timber, although by severance become personalty, was yet bound, as far as it could be, to the uses of the realty—that the administrator of Mrs. *Orde*'s first son was certainly not entitled, the child being dead at the time of the timber cut—neither could her second son claim it, for although he had a vested estate of inheritance, yet such estate was liable to be divested by the Duke's having a son. His Lordship therefore thought nobody at present entitled, but directed the Duke to pay into court to the credit of the cause, the sum of 2943*l.* 10*d.* for which the timber had been sold, and ordered that the Master should enquire into and ascertain the times at which the said sum or any part thereof was received by the defendant the Duke, and should compute interest thereon from such times respectively, and that the Duke should pay into court in like manner what should be found to be the amount of such interest, and that such principal and interest should be laid out, subject to further order with liberty for any person interested to apply. Reg. Lib. 1783. fol. 326.(*y*)

(*y*) 1 Cox 72. *Powlett* v. *Duchess of Bolton*, 3 Ves. 374. So *Perrot* v. *Perrot*, ub. sup. *Lee* v. *Alston*, 1 Ves. Jun. 78. S. C. 3 Bro. C. C. 37. *Dare* v. *Hopkins*, 2 Cox 110. *The Marquis of Lansdowne* v. *The Marchioness of Lansdowne*, 1 Mad. 140. As to what estates, other than of inheritance, entitle the tenants to cut timber, or to have it when cut, see *Williams* v. *Williams*, 15 Ves. 419. S. C. 12 East. 209. *Wickham* v. *Wickham*, Coop. 288. S. C. 19 Ves. 419. *Davis* v. *Duke of Marlborough*, 2 Swan. 144. *Skelton* v. *Skelton*, 2 Swan. 170 n. *Abrahall* v. *Bubb*, 2 Swan. 172 n. S. C. Freem. 53. and 2 Show. 69.

(*z*) But now the produce of the timber is laid out, and the interest paid to the tenant for life, *Wickham* v. *Wickham*, ub. sup.

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but this shall be done with the approbation of the Master; and trees though decaying, if for the defence and shelter of the house, or for ornament,(1) shall not be cut down. *B.* that is the tenant in tail, (and of age) of one moiety is to have a moiety of the clear money subject to such deductions as aforesaid; the other moiety belonging to the infant, must

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be put out, for the benefit of the infant, on government or real securities, to be approved of by the Master.(2)

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(1) Vide *Chamberlain* v. *Dummer*, 1 Bro. C. C. 166. and 3 Bro. C. C. 549. (*w*)

(2) The decree directs the Master "to enquire what timber there is standing on the said estates, that is in a decaying condition,(*t*) which is neither "a shelter or ornament to the seat, and "that such decaying timber as the "Master shall direct shall be cut down "from off the said estate, and sold by "such persons as he shall appoint for "that purpose, and out of the money "arising by the sale of such timber the "costs of all parties to this suit (to be "taxed by the said Master) are to be "first paid, and the residue of the said "money is to be put out at interest on "Government or other security, in the "names of trustees to be approved of "by the said Master for the benefit of "the said plaintiff *Robert Bewick* the "infant, to be paid him when he comes "of age, and the trustees are to declare "the trust of the said money, and all "parties are at liberty to apply to this "court from time to time, as there "shall be occasion, for further directions." Reg. Lib. A. 1733. fol. 512.

(*w*) S. C. 2 Dick. 600. *Lord Tamworth* v. *Lord Ferrers*, 6 Ves. 419. *Williams* v. *M'Namara*, 8 Ves. 70. *Day* v. *Merry*, 16 Ves. 375. *Delapole* v. *Delapole*, 17 Ves. 150. *Smythe* v. *Smythe*, 2 Swan. 251. S. C. Wils. 426. *Coffin* v. *Coffin*, Jacob. 70.

(*t*) So *Hussey* v. *Hussey*, 5 Mad. 44.

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14. Q. B. D. 809.

Case 67.

Elizabeth Sidney, ... Plaintiff.
The Hon. Jocelyn Sidney, Esq. . . Defendant.

On an Appeal from a Decree at the Rolls.

Lord Chancellor TALBOT. 2 Eq. Ca. Ab. 29. pl. 37

MRS. SIDNEY, the plaintiff, brought her bill against the defendant her husband, to have a specific performance of her marriage articles, dated the 17th of *October*, 1716, whereby

Where the wife sues the husband for a specific performance of her marriage-articles, and that he may settle such and such lands on her for her jointure; it is no bar to her demand, that she has eloped with an adulterer; much less if this be not by the husband put in issue in the cause.

the defendant, the husband, covenanted, that within eight months after the plaintiff *Elizabeth* should come to age, he would convey his estate in *Glamorganshire* to trustees, to the use of himself for life, remainder to the use of trustees to support contingent remainders, remainder to the use of his wife for her life for her jointure, remainder to their sons successively in tail male, remainder to the daughters in tail, remainder to himself in fee. Also the plaintiff *Elizabeth*, the wife, with the consent of her guardians, covenanted, that she should, within eight months after she should come to age, convey her estate in the same county, being about 350*l.* *per ann.* (but well stocked with timber) to the use and intent, that there should be paid thereout to the plaintiff *Elizabeth*, 100*l.* *per ann:* for her separate use during the coverture, 100*l.* *per annum* to her mother, and 50*l.* *per annum* to the plaintiff's sister, till she should come to age; and then she to have 1000*l.* and that her estate thus charged should be conveyed to the use of the defendant for life, [270] remainder to the use of the plaintiff, his wife, for life, remainder to the use of the first, &c. son in tail male, remainder to the daughters in tail, remainder to her right heirs. The timber upon her estate to be applied to pay off a mortgage of 5000*l.* on the defendant the husband's estate, and the surplus of the money arising by the sale of the timber to go to raise portions for younger children. So that the bill was, to compel the defendant the husband to perform his part of the articles, and that he might account for the timber he had cut down from off the wife's estate.

The defendant by his answer set forth, that the plaintiff the wife *had withdrawn herself from her husband; that she had lived separately, and very much misbehaved herself.*

The proofs were very strong, that the wife, the plaintiff, had had criminal conversation with another man: but in the depositions there being some evidence that the husband was also guilty of the like offence, so that the wife might recriminate; the Master of the Rolls decreed a performance of the articles, from which decree the defendant now appealed to the Lord Chancellor.

And it was insisted on behalf of the husband, that, considering the incumbrances and annuities on the wife's estate, the husband was a very little gainer therefrom; the wife in a court of equity appeared with but an ill grace, as endeavouring to compel a performance of her husband's agree-

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ment, when she herself had broken her own marriage contract in the most sacred and tender part of it; that with regard to articles, if the court finds any inconvenience will
[271] result from compelling a performance thereof, they will not decree that these should be specifically executed, but leave the party to his remedy at law; that in the present case, the decreeing an execution of these articles might occasion a disinherison of a lawful heir, and settle the estate upon such issue as, though born in wedlock, might yet really and in fact be illegitimate. For suppose that in this case, after the separation, there had been a son born, would this court have decreed a settlement to have been made whereby such son should have been intitled? And yet this would plainly have been the consequence, since such son being born in wedlock, must have taken by virtue of the settlement; that indeed where a separation has been in pursuance of a divorce, the courts at law will presume that the husband and wife have lived separately in obedience to the sentence: but in the case of a voluntary separation only, the husband's access to the wife shall be taken for granted, and a child born shall be construed legitimate, and no evidence admitted to the contrary; according to the distinction in 1 *Salk.* 123. at the same time it may be notorious to every one that such child was not begotten by the husband; that in the principal case it was in proof, that the plaintiff did elope from the defendant her husband, and went away with one *James Jenkins*, to a cottage about three miles from where her husband lived, since which there had been no pretence of any reconciliation, so that this was a bar of dower. 1 *Inst.* 32. 1 *Roll. Abr.* 680. And if in a court of law, the wife behaving in this manner, would not be helped to her dower, which is supposed to be her bread and subsistence, why should equity assist such a woman so as to cause any articles to be performed in her favour, which is a matter always left to the discretion of the court? That the wife in the present case had her remedy at law upon an action of cove-
[272] nant to be brought in the name of the trustees: but it might well be doubted, whether he had any remedy against the wife, in regard at the time of the marriage she was an infant, and [G] her covenant with the trustees, would hardly bind her at law.

[G] And yet it seems, that where a feme infant seised in fee covenants with the consent of her guardians, in consideration of a settlement, to convey her in-

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It was admitted, had there been an actual jointure made upon the wife, so as to have vested a fixed legal estate in her, that could not have been forfeited by the wife's elopement; but where the matter rested only upon articles, and the wife had no remedy but by bringing a bill for the specific performance thereof; here a court of equity might with the greatest reason and justice refuse to lend a helping hand; might well deny that assistance which in a case of common articles, and in a fair and honest cause, they are ready to afford the parties: that it had indeed been (*a*) said, that adultery is no bar of dower; and probably it is not, where the husband and wife continue to cohabit; but no books say, that where the wife elopes with another man in adultery, (as in the present case) this is not a bar of dower. And surely, if it be a bar to a recovery at law, it is at least equally reasonable it should be so, with respect to any aid sought in equity upon articles for the wife's provision.

(*a*) See Noy 108.

Further: it was said to be material; that in such case of elopement of the wife, nothing could restore the wife to her dower, but the reconciliation of the husband; that it was not sufficient, so as to intitle her to her dower, that she could recriminate, or say, her husband was guilty of the like offence, for nothing could avail her as to this, but the (*a*) forgiveness of the injured husband. Very observable also is the difference which the law makes, where this offence of adultery is committed by the husband, and where by the wife. In the former case, where the husband goes away from the wife, and lives with another woman in adultery, this is no bar to the husband's being tenant by the curtesy: but on the wife's leaving her husband, and eloping with an adulterer, she thereby forfeits her dower. The reason of which may be, for that the consequence of such crime in the wife is worse to the husband's family, by making the children which she may have by the adulterer inheritable to the husband's estate, to the prejudice of the next heir: whereas the husband's children begotten on another woman are incapable of bringing that mischief on a family, or injuring the

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heritance to her husband; if this be done in consideration of a competent settlement, equity will execute the agreement, though no action would lie at law to recover damages. See vol. 2. 244. *Cannel* v. *Buckle*.

(*a*) See *Dyer* 106. Lady *Powys*'s case, where a reconciliation by the husband, after the wife's going away with the adulterer, is specially pleaded, and the plea allowed.

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next legitimate heir; that all this was greatly aggravated in the principal case, by reason of the near alliance which Mr. *Sidney* had to a peerage, to an ancient illustrious peerage, attended with a suitable estate, being only brother and presumptive heir to the Earl of *Leicester*, at present a bachelor; so that, as it was apprehended, the matter of recrimination, though the principal ground of his Honor's decree, was not sufficient to warrant the same.

Object. But it has been objected below, that the husband has not by his answer put this matter of adultery in issue, it being only said, that the wife had withdrawn herself from her husband, lived separately, and very much misbehaved
[274] herself: all which she might do, and not be guilty of adultery, since there may be several acts of misbehaviour in a wife besides that of adultery.

Resp. The wife could not but be sensible of what nature her misbehaviour was; this must be best known to herself: and it was the kindness and tenderness which the husband had for the character of his wife, not to suffer these great stains upon her reputation to be registered upon record, to the perpetual infamy of herself and family; and therefore before he should go so far, the husband might well hope his wife would repent of her fault, and put a stop to this so unseasonable a suit; and it is a sad excuse made on behalf of the wife, to say the husband, who had just reason to charge her in the plainest and most distinct terms with this infamous crime of adultery, has in tenderness to her forborne to do so, and now she will take advantage of it; thus with equal art and ingratitude turning the kindness that has been shewn her against him who shewed it.

2*d Object.* But supposing this crime to have been ever so sufficiently set forth, yet this court cannot judge of adultery, or in any sort punish it, which is proper only for the spiritual court.

Resp. Where things of this nature are incidentally mixed with others, the courts of law (and much more of equity) may take notice of them: thus the courts of law, where the wife's elopement with the adulterer is pleaded in bar of dower, must try such plea: and as they may do it in that case, what should hinder this court from doing the like in
[275] the present? So the trial of a marriage, which is as much of a spiritual cognisance as any thing can be, is determinable at law, where it comes incidentally in question.

3*d Object.* If the defendant insists upon this, that the plaintiff, the wife, ought not to have aid upon these articles; then on the other hand he himself is not to expect any aid or assistance in respect thereof.

Resp. All this may be admitted; and Mr. *Sidney*, the husband, will be in a better condition without the articles, than with them; thus, independent of the articles, he will be entitled to the rents and profits, and will have a power to sell all the timber from off his wife's estate to his own use.

Lastly, It was observed that the husband was not plaintiff in this cause, but the wife, and where she has thought fit to apply in a cause of turpitude, as a court of equity has frequently been resembled to a fountain distributing its relief through pure and clear streams, so it was hoped that this being a cause of a contrary nature, and consisting of several proofs of turpitude, therefore, the court would not afford the plaintiff the least favour or assistance whatever.

Lord Chancellor. What has been asserted of a child begotten and born during the time of the voluntary separation of the husband and wife, *(viz.)* that no evidence shall be admitted to prove the illegitimacy of such child, is now held to be otherwise. For if a * jury find the husband had no access, (*x*) such child will be a bastard, according to the determination in the case of *Pendrel* v. *Pendrel.* [H] As in the present case, at the hearing of the cause the defendant has insisted upon what might have been very penal to the plaintiff his wife, *(viz.)* the forfeiture of her dower, the crime for which she might have incurred such a penalty, ought to be plainly laid to her charge, specified and put in issue, (1) that she may know what to rest her defence upon:

In the case of a divorce a mensa et thoro, baron and feme live separately, and the wife has a child; this is a bastard, for the court will intend obedience has been paid to the sentence during this time. But if in the case of a voluntary separation a child is born, this is legitimate.

Secus, where the jury find the husband has had no access to his wife. If the party charges his adversary with any thing criminal, it ought to be shewn with great plainness and certainty. Articles to settle lands in jointure are in nature of an actual jointure, which is not forfeited by an elopement, like dower. [*276]

[H] Heard before the Lord *Talbot*, *February* 5, 1733, where the husband and wife by consent lived separately, and a child being born, an issue was directed to try whether the child was a bastard, and it was found a bastard, 2 Stra. 925. And so indeed (however it happened to be overlooked by the defendant's counsel) it is said at the bottom of the case cited from *Salkeld*; wherefore this point is now settled for law.

(1) *Watkyns* v. *Watkyns*, 2 Atk. 97. *Clarke* v. *Periam*, 2 Atk. 337. (*y*)

(*x*) See *Goodright* v. *Saul*, 4 T. R. 356. *Rex* v. *Luffe*, 8 East. 193. *Head* v. *Head*, 1 S. & S. 150. 1 Turner 138. *Banbury Peerage case*, 1 S. & S. 153.

(*y*) *Clarke* v. *Turton*, 11 Ves. 240. *Willan* v. *Willan*, 19 Ves. 600. *Blake* v. *Marnell*, 2 Ba. & Be. 47. *Wheeler* v. *Trotter*, 3 Swan. 176 n.

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whereas here her accusation is only general and uncertain, amounting to little else than that she has *withdrawn herself from her husband, lived separately from him, and very much misbehaved herself:* nothing of which implies, that the plaintiff has been guilty of adultery, much less that she has eloped from him, and gone away with an adulterer, which alone would bar her of her dower, supposing this were purely a question of dower. But the articles being, that the husband shall settle such and such lands in certainty on his wife the plaintiff, for her jointure, this is pretty much in the nature of an actual and vested jointure; in regard what is covenanted for a good consideration to be done is considered in equity in most respects as done; consequently, this is a jointure, and not forfeitable either by adultery or an elopement. (1)

Why a husband does not forfeit his tenancy by the curtesy on leaving his wife, and living in adultery, as a wife forfeits her dower by elopement, &c.

The reason of the difference why a wife, in case of an elopement with an adulterer, forfeits her dower, and yet the husband leaving his wife, and living with another woman, does not forfeit his tenancy by the curtesy, is, because the statute of *West.* 2. *cap.* 34. does by express words, under these * circumstances, create a forfeiture of dower: but there is no act inflicting, in the other case, the forfeiture of a tenancy by the curtesy.

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As to the recrimination appearing in the proofs, this does not seem to me so much to affect the case. Indeed, with regard to the evidence of the crime in the wife, there seems to be sufficient to convince any third person that she is not innocent: but the same not being put in issue in the cause, I cannot judge of it. Affirm the decree, and let the husband perform his marriage articles, and account for the timber which he has cut on the wife's estate contrary to the articles. The costs to go out of the estate. (2)

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(1) In *Blount* v. *Winter*, and *Winter* v. *Blount*, *July* 19, 1781, the original bill was filed by trustees in marriage articles and the children of the marriage, against the husband and wife, and the cross bill was filed by the husband against the wife and children—the original bill prayed a performance of the articles, and the husband by his answer to the original bill and by the cross bill resisted the performance so far as the articles made a provision for the wife, alleging and proving in the cross cause, that she lived separate from him in *adultery*. The court was of opinion that this was not a reason for non-performance of the articles as to the wife, and made a decree accordingly in the original cause, and dismissed the cross bill without costs. Reg. Lib. A. 1780. fol. 550. (z)

(2) Reg. Lib. B. 1733. fol. 211.

14. Q. 13. D. 809.

(z) *Ball* v. *Montgomery*, 4 Bro. C. C. 339. S. C. 2 Ves. Jun. 191. *Seagrave* v. *Seagrave*, 13 Ves. 439. *Lee* v. *Lee*, 1 Dick. 321. *Buchanan* v. *Buchanan*, 1 Ba. & Be. 203.

JOHNSON *v.* OGILBY et al'.

Case 68.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 31. pl. 39. An attorney for and on behalf of his client the defendant promises to pay 500*l.* to the plaintiff; this being done by the authority of the client, the attorney is not liable, but only the client. Secus, if the attorney had no authority from his client to make this engagement.

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2. Bea. 465.
45. Ch. D. 354.

THE bill was for a specific performance of an agreement, on this case: *Margaret Quineo* and the plaintiff *Robert Johnson*, having some differences as to four freehold houses in *Silver-street, London;* upon compromising those differences, it was agreed between them, that the said *Margaret Quineo* and *Robert Johnson* should join in a fine and recovery, which should be, as to two of the houses, to the use of *Margaret Quineo* and her heirs, and as to the other two houses, to the use of the plaintiff, *Robert Johnson*, and his heirs; which fine and recovery were accordingly levied and suffered.

After this *Margaret Quineo* pretended she was then a feme covert, and married to the defendant *Ogilby;* whereupon **Robert Johnson* brought a bill against *Ogilby* and his wife, to discover whether she was married, when she levied the fine, and suffered the recovery, and to be relieved against the fraud. To which bill the defendants, *Ogilby* and his wife, put in their answer insisting on her being then a feme covert, and that she was not bound by such fine and recovery. Thereupon the plaintiff *Johnson* preferred a bill of indictment against the defendant *Margaret* for a cheat, and for the fraud in levying a fine, and suffering a recovery, at the court of common pleas, as a feme sole, when at the same time she was under coverture.

The indictment being found, upon not guilty pleaded, was brought to a trial: but just before the trial was to have come on, the parties came to an agreement, that the plaintiff should assign over his right to the premises, and the defendant pay the plaintiff 580*l.* and one Mr. *Heaton*, who was the defendant's attorney on this indictment alone, signed the agreement, for and on the behalf of his clients, *Ogilby* and his wife; *Johnson* also signed the agreement, which was left in the hands of one Mr. *Callard*, a third person; and the defendant *Margaret* was hereupon acquitted for want of prosecution.

Afterwards the money not being paid, the plaintiff *Johnson* brought his bill against *Ogilby* and his wife, and Mr. *Heaton* the attorney; and it was insisted, that *Heaton*, by signing this agreement, was become personally liable, and

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had taken upon himself, as a surety for his client, to pay the money; that as an attorney could (it must be admitted) undertake for his client, so here he had done it.

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Lord Chancellor. The difference is, where the party thus undertaking for and on the behalf of his client, *has* an authority so to do, and where he *has not*. If such undertaker has no authority, then it is a fraud, and the undertaker ought himself to be liable (*x*): but where there is such an authority given, (as here there was to the attorney) this is only acting for another, like the case of a factor or broker acting for their principals, who were never held to be liable in their own capacities; in which his Lordship being very clear, the bill as to this point was dismissed, against *Heaton* the attorney, with costs.

Brokers or factors, who act for their principals, not liable in their owncapacities.

Then the Lord Chancellor started another point, (*viz.*) that this was a criminal prosecution; and the agreement being to stifle a criminal prosecution, (*y*) was therefore not to be executed in equity.

A bill in equity lies not to compeltheperformance of an agreement to pay money in consideration of having stifled a prosecution for felony; secus, if to stop a prosecution at law for a fraud.

To which I answered, that it was true, in the case of a prosecution for felony, an agreement to stifle such a prosecution was not lawful; but where the indictment was for a fraud, and the party wronged by the fraud came to an agreement to be satisfied for such injury, (as in conscience he ought to be) this was lawful, matters of fraud being cognizable and relievable as well in equity (*a*) as at law: wherefore this objection was no further insisted on.(1)

(*a*) Vol. 2. 156, 220.

(1) All that appears by the Reg. B. is this: "That the cause coming on to "be heard, &c. his Lordship declared, "that the agreement in the bill mentioned is such as ought not to be "carried into execution by this court, "and that the defendant *Heaton* is "noways bound thereby or affected "therewith; and the plaintiff not now "praying a foreclosure, the bill was to "be dismissed against the defendant "*Heaton* with costs, and against the "other defendants without costs." Reg. Lib. A. 1733. fol. 337.

(*x*) So where a solicitor opened biddings in the name of an imaginary person, he was ordered to stand as best bidder at the price at which he opened the biddings, *Molesworth* v. *Opie*, 1 Dick. 289.

(*y*) *Collins* v. *Blantern*, 2 Wils. 347.

HEAD *v.* EGERTON.

Case 69.
Lord Chancellor TALBOT.

Where there is a subsequent mortgagee without notice, who has possession of the title deeds, the first mortgagee shall not compel a delivery of the writings from him without paying him his mortgage-money.

1. Hare. 82.
2 q. ch. D. 726.

THE bill was to foreclose the defendant's equity of redemption to the mortgaged premises, and to compel the defendant to discover the title deeds relating thereto, and to deliver up the said title deeds to the plaintiff, insisting, that they belonged to him, as owner of the land. For which purpose the bill set forth, that one *Spencer* made a mortgage of the lands to the plaintiff, and that the plaintiff having a great confidence in the said *Spencer*, and the mortgage being executed in *London*, and *Spencer* pretending his title deeds were in the country, the plaintiff lent his mortgage money to *Spencer*, taking *Spencer*'s word that he would deliver to him the title deeds; and afterwards the said *Spencer* borrowed 2000*l.* of the defendant, Doctor *Egerton*, on a mortgage of the same lands, at the same time producing and delivering to the defendant *Egerton* all his title deeds, which were perused by the defendant *Egerton*'s counsel, and thereupon the title approved.

The plaintiff bringing such bill as above, the defendant pleaded to that part of the bill which prayed a discovery and delivery up of the title deeds; and by his plea insisted that *Spencer* made a mortgage to him of the same lands, and that the title deeds were delivered to him by the said *Spencer*, in order to support his title to the mortgage; that he had no notice of the prior mortgage to the plaintiff; and being thus a mortgagee without notice, a court of equity ought not to assist the plaintiff and take the title deeds from the defendant, without ordering him to be paid his mortgage money.

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The first mortgagee permits the mortgagor to keep the title deeds, and the mortgagor shewing a fair title, mortgages the premises to a second mortgagee, to whom he delivers the deeds; the first mortgagee is accessory to the drawing in of the second.

Lord Chancellor. It is hard enough upon the defendant that he has lent his money upon lands subject to a prior mortgage: but he having had no notice thereof, I will not add to his hardship by taking away from him the title deeds, unless the plaintiff will pay him his money, especially in a case where the plaintiff has himself been in some measure accessory in drawing in the defendant to lend his money, by permitting *Spencer*, the mortgagor, to keep the title deeds in his possession, the delivery of which the plaintiff ought to have insisted on when he took the mortgage. (1)

(1) It seems necessary to make out a case of *fraud* or *gross negligence* against the first mortgagee, in order to postpone him to a second mortgagee in

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EGERTON.

In the pleading of a purchase or mortgage, the defendant must plead that the seller or mortgagor was, or pretended to be, seised in fee.

Note also; It was said in this case by the Lord Chancellor, that in the defendant's pleading of a mortgage or purchase he ought to shew that the vendor or mortgagor being, or pretending to be, seised in fee of the premises, did make such conveyance or mortgage,(*x*) &c. otherwise the person undertaking to sell or mortgage may be a mere stranger, and have no interest in the premises, though he takes upon him to sell or mortgage them.

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possession of the title deeds. *Peter* v. *Russell*, 1 Eq. Ca. Ab. 321. pl. 7. *Gillespy* v. *Coutts*, Amb. 652. *Tourle* v. *Rand*, 2 Bro. C. C. 650. *Plumb* v. *Fluitt*, in the Exchequer. *Feb.* 1791.(*z*) Et vide *Mocatta* v. *Murgatroyd*, ante, 1 vol. 393. (*y*)

(*z*) Reported 2 Anstr. 432.

(*y*) So *Evans* v. *Bicknell*, 6 Ves. 183, 190. *Barnett* v. *Weston*, 12 Ves. 133. *Harper* v. *Faulder*, 4 Mad. 129.

(*x*) *Story* v. *Lord Windsor*, 2 Atk. 630. *Attorney-General* v. *Backhouse*, 17 Ves. 290. It is also necessary to aver that he was in possession. *Trevanian* v. *Mosse*, 1 Vern. 246. *Strode* v. *Blackburn*, 3 Ves. 226. *Wallwyn* v. *Lee*, 9 Ves. 32. *Daniels* v. *Davison*, 16 Ves. 252. And in pleading a fine, a substantive averment of seisin is necessary. *Page* v. *Lever*, 2 Ves. J. 450. *Dobson* v. *Leadbeater*, 13 Ves. 230.

DE

TERM. S. TRINITATIS, 1734.

ANNESLEY *v.* ASHURST.

Case 70.

Lord Chancellor TALBOT.

2 Eq. Ca. Abr. 31. pl. 41.

A trust estate was decreed to be sold for the payment of debts and legacies, and to be sold to the best purchaser. A. articles to buy the estate of the trustees, and brings a bill to compel them to perform the contract; the trustees by their answer disclose this matter; the court will make no new decree, but will leave the former decree to be pursued.

A TRUST estate was decreed to be sold for the payment of debts and legacies, and to be sold to the best purchaser, before the Master. The plaintiff, Mr. *Annesley*, contracted for the purchase of the premises, and entered into articles with the trustees for that purpose. It did not appear that the purchase was an unfair one: but this method seemed to have been taken to avoid the charge and trouble of bidding before the Master, and of the Master's report, and of getting this confirmed. Afterwards, the trustees scrupling to convey without a decree to indemnify them, Mr. *Annesley* brought a bill against the trustees to compel them to convey, and for their indemnity; and the trustees by their answer disclosed this matter, and submitted to the court, being willing, if indemnified, to convey the premises to the plaintiff *Annesley* pursuant to the contract.

Cur'. This is all going out of the way. Here is a decree directing how and in what manner this trust estate should be sold, *viz.* to the best purchaser, and before the Master; which decree must be pursued; for I cannot make one decree to contradict the other. The plaintiff, Mr. *Annesley*, if he has a mind to this estate, must go before the Master and get himself reported the best purchaser; and though nothing unfair appears, yet there is ever occasion to suspect, when people are going out of the way.(*x*) [283]

(*x*) So under an act of Parliament for the sale of estates, directing the conveyance to be such as the court should think proper, the court would not approve a conveyance without a reference to the Master. *Ex parte the Duchess of Newcastle*, 6 Ves. 454.

COOK *v.* ARNHAM.

Case 71.

On an appeal from the decree at the Rolls.

Lord Chancellor TALBOT.

Ca. temp. Talb. 35.
2 Eq. Ca. Abr. 235. pl. 24.
If a copyhold be devised to a younger child, and no surrender to the use of the will, though by the same will there be other provision made for the child, yet such copyhold being part of the provision, the court will make it good, unless in a case where the eldest son and heir is totally disinherited; for the father is judge of what is a proper provision for his child; and though the devise be of a copyhold to a second son, after the death of the eldest without issue, equity will supply the want of a surrender.

ONE seised in fee of some copyhold lands, devised the same to his grandson that was his heir at law, *viz.* (the testator's deceased eldest son's son) for his life, remainder to the first and every other son of the grandson in tail male, successively, remainder to the daughters of his grandson in tail, remainder to the testator's second son in fee; and by the same will devised some other lands to his said second son, and died, without having surrendered the copyhold premises to the use of his will.

The grandson, the heir at law, surrendered the copyhold to the use of his will, and having devised them to his mother and her heirs, died without issue. The mother disposed of
[284] the same copyhold premises from the second son, and died about fifteen years after the grandson. Whereupon the second son brought his bill in equity, suggesting that his father, who devised to him these copyhold premises in remainder as aforesaid, intended them as part of his provision; and that, as equity would supply the want of a surrender in such case, therefore, he prayed that the person to whom his mother had disposed of the same, might surrender them to the use of him (the plaintiff) in fee.

This cause was about a year since heard at the Rolls, before Sir *Joseph Jekyll*, when it was objected that by the same will there was some *other* provision made for the plaintiff, which was sufficient for his maintenance, and that the court would not, (as was conceived) supply the want of a surrender of a copyhold, but in a case where that was the *only provision;* also, for that this devise to the plaintiff was too remote, it being after an estate-tail.

The Master of the Rolls held clearly as to the first point, that the father was the only judge what was a proper provi-

sion for any of his children; and that, if he did not leave his eldest son quite destitute, though he had given a sufficient advancement to the second son, exclusive of the copyhold, yet as the copyhold was intended to be part of the provision for such son, the court ought to supply the want of a surrender in his favour. But with regard to the other objection, his Honour conceived this was too remote a devise to the plaintiff to be looked upon as a provision, the same being a devise to him after the death of the grandson without issue male or female, which could not reasonably be thought a provision, as in all probability it would not happen until after the plaintiff's death; that no money could be raised for him by a sale of so distant a remainder: also, [285] for that the suit was commenced after so great a length of time since the grandson's death. Wherefore his Honour dismissed the bill.

From this decree at the Rolls, the plaintiff, the second son, appealed to the Lord Chancellor, before whom the matter was fully debated by counsel on both sides. And with respect to the first point, his Lordship concurred in opinion with the Master of the Rolls, namely, that it was not material that by this will the copyhold was not the sole provision made for the second son the plaintiff, the father only being the judge of what was a proper advancement for his child, according to the cases of *Kettle* v. *Townsend*, *Salk.* 187. *Burton* [A] v. *Floyd*, decreed first by Sir *John Trevor* at the Rolls, in *Trinity* 1712, and affirmed by the Lord *Harcourt*, in *Michaelmas* 1713, and *Strudwick* v. *Strudwick*, by the Lord *Macclesfield*, *Paschæ*, 1720. And it would create the greatest uncertainty imaginable, if the court should on these occasions enter minutely into the consideration of the

[A] It appears from the Register's book, that in this case of *Burton* (1) and *Lloyd*, the bill was brought (*inter al'*) to supply the deficiency of a surrender left in the hands of a customary tenant, and not presented at the next court. The uses of the surrender were, to the testator's eldest son *Andrew Burton* and the heirs male of his body, and for want of such issue, to the plaintiff *Cornelius Burton*, the second son, and the heirs male of his body, remainder over; so that, as in the principal case, the plaintiff claimed a remainder expectant on an estate-tail; and was also, as appears by the pleadings, otherwise provided for by the said testator. The cause was heard before his Honor, 3 *July*, 1712, who decreed for the plaintiff; and on the 14th of *November*, 1713, that decree was on an appeal affirmed by the Lord Chancellor. (2)

(1) 6 Vin. 56. pl. 20.

(2) And again on an appeal to the Lords, 1 Bro. P. C. 544.

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quantum of the provision given by the parent: that in all cases of this kind what comes from the parent is looked upon as a debt by nature, and may be resembled to a copyhold being devised for payment of debts, where the want of
[286] a surrender is ever supplied; that the case might have been otherwise, had the heir at law been totally disinherited. (1)

But with relation to the other point, (*viz.*) whether equity should supply the want of a surrender in this case of a copyhold given to the plaintiff, the second son, after the grandson's death without issue, his Lordship differed in opinion from the Master of the Rolls; for that, taking it for granted (as it must be) that equity will supply the want of a surrender in the case of a devise of a copyhold to a younger child, he was unwilling, he said, to make any new unnecessary or refined distinctions, which would be to render the profession of the law a *matter* (*a*) *of memory rather than of reason and judgment.* That so far was plain: the devise of the copyhold in the present case to the younger son, though remote, yet might be for his benefit and advancement. Every limitation allowed by the law to be made is of some value, else it would be absurd to allow it. Suppose the father, in limiting the devise now in question, had added, that the same was intended for the provision of the devisee, would it be reasonable for the person who was to judge of and expound the will, to say, it was not for the provision of the devisee, when the testator himself had said the contrary.

Now, though these words, *for his provision,* are not expressed in the will, yet they seem implied; *et expressio eorum quæ tacitè insunt nihil operatur.* Suppose the devise to the younger son had been *after one life,* there would then have been no doubt about supplying the want of a surrender. Suppose it had been after *two, three, or four lives,* where
[287] must we have fixed our bounds? Suppose all the rest of the testator's estate had been settled, so that he had had no other part left at liberty, but such a remainder after one or two lives, or after a death without issue; and he had devised this remainder or reversion, as an advancement to his younger son, otherwise unprovided for, and afterwards this remainder, remote as it had been, should fall into possession, as in the

(*a*) See the Lord *Cowper's* argument, when he gave judgment in the case of *Newcomen* v. *Barkham*, 2 Vern. 733.

(1) Vide *Watts* v. *Bullas*, ante, 1 vol. 60.

present case; surely the court would have supplied the want of a surrender; that what seemed to have created a difficulty in these cases was, an unwillingness to take from the heir an estate vested in him by act of law: but if such defect would be supplied, where the whole estate of the copyhold is given away in possession from the eldest to the youngest son, will not equity do this *à fortiori*, when but part, when a remote reversion only is disposed of from the heir, and he consequently less prejudiced? Besides, here, on the grandson's dying without issue, the plaintiff, the second son, became heir to the testator; so that no heir would be disinherited by supplying the want of this surrender. That as to the objection of the length of time which had incurred between the death of the grandson without issue, and the bringing of the bill, it had been offered by way of excuse, that the plaintiff had spent a good deal of time in inquiring into and searching the court rolls, in order to find out a surrender to the use of the will; and though this was but a slight excuse, yet the length of time was not above fourteen years, which, as it would not bar an ejectment, so neither could it bar a bill in equity. (*a*) [B]

Length of time which will not bar an ejectment shall not bar a bill in equity.

(*a*) 1 Vol. 270.

[B] On a demurrer to a bill to redeem a stale mortgage, where the mortgagee appeared by the bill to have been in possession above twenty years; the court held the defendant need not plead the length of time, but might demur; and that no redemption should be allowed in such case, unless there was an excuse by reason of imprisonment, infancy, or coverture, or by having been beyond sea; and not by having absconded, which is an avoiding or retarding of justice: that there did not seem to be any certain time when the length of possession of the mortgagee should bar the mortgagor's right of redemption: but as twenty years would bar an entry or ejectment, abstracted from the excuses above mentioned, there was the same reason for allowing it to bar a redemption. (*w*) (1) And the

(1) *Sed quære*, Whether this can be taken advantage of by way of *demurrer*. Vide *Frazer* v. *Moor*, Bunb. 54. *Aggas* v. *Pickerell*, 3 Atk. 225. *Beckford* v. *Close*, cited in *Earl of Deloraine* v. *Brown*, 3 Bro. C. C. 644. In *Edsell* v. *Buchanan*, in Cha. 11th *March*, 1793, Lord Chancellor

(*w*) It is now decided that 20 years' possession by a mortgagee will, *primâ facie*, bar a right of redemption. *Bonney* v. *Ridgard*, 1 Cox 149. *Whiting* v. *White*, 2 Cox 290.; and Coop. 1. *Hardy* v. *Reeves*, 4 Ves. 466. *Barron* v. *Martin*, 19 Ves. 331., and Coop. 191. *Hodle* v. *Healey*, 1 V. and B. 536. *Hovenden* v. *Lord Annesley*, 2 Sch. and Lef. 636. *Cholmondeley* v. *Clinton*, 2 J. and W. 179. and 191. *Harrison* v. *Hollins*, 1 S. and S. 471.: but the possession of the mortgagee must have been of the whole estate, and not of a part only. *Rakestraw* v. *Brewer*, Mos. 189. Sel. Ca. in Cha. 55. *Burke* v. *Lynch*, 2 Ba. and Be. 431. *Blake* v. *Foster*, 2 Ba. and Be. 573. Sed vide *Lake* v. *Thomas*, 3 Ves. 22.; and if the mortgagee within

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Wherefore his Lordship decreed, that the want of a surrender of the copyhold to the use of this will ought to be supplied; and that the defendant who claimed the premisses under the mother should, at the plaintiff's charge, surrender them to the use of the plaintiff and his heirs. (1)

demurrer was allowed, *Jenner* v. *Tracy*, *Paschæ*, 1731, by the Lord *King*. The same rule was agreed in the case of *Belch* v. *Harvey*, *Michaelmas*, 1730, (*y*) by the Lord *Talbot*, who likewise declared it to be his opinion, (though that case was afterwards compromised) that whereas this court had not in general thought proper to exceed twenty years where there was *no disability*, in imitation of the first clause of the statute of limitations; so *after the disability removed*, the time fixed for prosecuting in the proviso (which is ten years) ought in like manner to be observed.

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expressed much doubt on this question: but the demurrer in that case was over-ruled on another ground. (*x*)

(1) But directed the account of rents and profits only from the time of *filing the bill*, Reg. Lib. A. 1733. fol. 480. 2 Eq. Ca. Ab. 235. pl. 24.(*z*)

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20 years treats his estate as a mortgage, or admits it to be only a mortgage, redemption will be decreed, *Whiting* v. *White*, ub. sup. *Lake* v. *Thomas*, ub. sup. *Hardy* v. *Reeves*, ub. sup. *Hansard* v. *Hardy*, 18 Ves. 455. *Hodle* v. *Healey*, ub. sup. *Hovenden* v. *Lord Annesley*, ub. sup. *Reeks* v. *Postlethwaite*, Coop. 161. *Price* v. *Copner*, 1 S. and S. 347. In a Welsh mortgage, time is no bar to redemption, unless the party has held over 20 years after the debt fully paid. *Fenwick* v. *Reed*, 1 Mer. 125. It seems somewhat doubtful, whether a mortgage can be made available against a mortgagor who has been in possession, without acknowledgment or claim for 20 years. *Leman* v. *Newnham*, 1 Vez. Sen. 51. *Toplis* v. *Baker*, 2 Cox 118. *Blewitt* v. *Thomas*, 2 Ves. Jun. 669. *Christophers* v. *Sparke*, 2 J. and W. 234.

(*x*) 4 Bro. C. C. 254.; and 2 Ves. Jun. 83. Upon the authority of the later cases, it seems that a demurrer would hold. *Hardy* v. *Reeves*, 4 Ves. 479. *Foster* v. *Hodgson*, 19 Ves. 180. *Hodle* v. *Healey*, ub. sup. *Hovenden* v. *Lord Annesley*, ub. sup.

(*y*) Sugd. Vend. 5th Ed. App. 22.

(*z*) *Kidney* v. *Coussmaker*, 12 Ves. 158.; and see *Bennett* v. *Whitehead*, ante, 2 vol. 644.

Case 72.

PIDDOCK *v.* BROWN, ET AL'.

Lord Chancellor TALBOT. 2 Eq. Ca. Ab. 397. pl. 13. A good rule at law, that where to a suit there are never so many defendants if the plaintiff cannot give evidence against a defendant; he may be called as a witness for a co-defendant; and so it is in equity.

ONE who was made a defendant in equity was examined as a witness, *saving just exceptions*. And it was objected to the reading of his depositions, that though there could be no decree against him, yet his answer being falsified in many

parts of it, he might be liable to a prosecution for perjury, and consequently not so indifferent with respect to the event of the cause as a witness should be; and that this defendant had been very active in the interest of other defendants in the cause.

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Lord Chancellor. It is a good rule at law, that when the plaintiff has made many persons defendants, and the principal defendant calls one of the co-defendants to be a witness: if the plaintiff cannot give some (*a*) material evidence against him, he is allowed to be a good witness, else it would be in the power of the plaintiff to take off all the defendant's witnesses by naming them defendants in the action; and in the present case I do not see how the plaintiff has any equity against this defendant. Therefore let his depositions be read. (1)

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(*a*) 1 Skin. 673.

Secondly, It was declared by the Lord Chancellor, that upon producing a bond or mortgage, this *primâ facie* is a good evidence of a debt: but that wherever there are manifest signs of fraud in the obligee, &c. in such case he ought to be put to the proof of actual payment (*y*); and though he may happen thereby to lose some part of the money really due to him, for want of being able to make sufficient proof; this is but a just punishment of him for the fraud which he plainly appears to have been guilty of, and will be a proper discouragement to others from committing the like. (2)

A bond or mortgage is prima facie a good evidence of a debt: but in case fraud appears, the obligee, &c. ought to prove actual payment.

Thirdly, An account being directed, and that all parties should be examined on interrogatories, and it appearing that the plaintiff who brought this bill to be relieved against a security into which he was drawn without any valuable consideration, was a weak man, and easy to be prevailed upon to defendant's examination, lest he should unwarily admit something against himself that was not true.

The defendant being a weak man, and to be examined on interrogatories; the Master was ordered to take such

(1) *Barret* v. *Gore*, 3 Atk. 401. *Nightingale* v. *Dodd*, Amb. 583. (*x*)

(2) The bill was filed to impeach some bonds, as obtained from the plaintiff by fraud and imposition. Reg. Lib.

(*x*) It is a motion of course to examine a co-defendant as a witness, saving just exceptions upon an allegation that he has no interest, *Lee* v. *Atkinson*, 2 Cox 413, which allegation is construed to mean no interest in the matters to which it is proposed to examine him. *Murray* v. *Shadwell*, 2 V. and B. 405. Yet if, when the motion is made, the court perceives an interest, it will not make the order. *Anon.* 18 Ves. 517. Nor is it a motion of course after a decree. *Francklyn* v. *Colquhoun*, 16 Ves. 218.

(*y*) *Wharton* v. *May*, 5 Ves. 27. *Vaughan* v. *Lloyd*, cited, 5 Ves. 48.; and see *Osmond* v. *Fitzroy*, ante, 129.

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say and admit in his examination any thing that was untrue, how much soever to his prejudice: it was therefore prayed, that the court would so order it, as that no such advantage should be taken of these circumstances.

Whereupon the court directed, that in case the defendant [290] exhibited interrogatories against the plaintiff, the Master should take care to examine the plaintiff in person, and thereby see that no advantage should be taken of his weakness. (1)

(1) Reg. Lib. B. 1733. fol. 489.

Case 73.

COLE *v.* GIBBONS ET AL', AND MARTIN *v.* COLE ET AL'.

2. Tu. Rep. 476.

On a Rehearing from a Decree of the Lord Chancellor King.

Lord Chancellor TALBOT.

ANDREW MACKEAN, of *London*, mercer, had a wife *Catharine*, and no issue, and a nephew *Martin*, who was plaintiff in the cross cause. *Andrew Mackean* made a will, giving thereby, *inter al'*, a legacy of 500*l.* payable to his nephew *Martin*, if he should survive the testator's wife *Catharine*, who, by the will, was to have the interest of this 500*l. inter al'*, for her life, as also the principal, in case she should survive the testator's nephew *Martin*. Soon after which the testator died. The testator's nephew *Martin* was a young man of about twenty-four years of age, but had led an extravagant life, and had been for some time in *Newgate*. Mrs. *Mackean*, the testator's widow, was about sixty-four years old; but as to her state of health, there was variety of evidence.

A. having 500*l.* given him by his uncle, in case he should survive the testator's wife, sells it for 100*l.* to be paid by 5*l.* per annum; but that if the testator's wife should die before A. and the legacy become due, in such case the rest of the money to be paid within a year then next. A. does survive the testator's wife, and knows the legacy was become due to him, and being fully apprised of the whole fact, confirms the bargain: he shall be bound thereby.

Martin had offered to sell this contingent legacy of 500*l.* which was payable to him, in case he should survive his aunt *Mackean*, to several persons, and amongst others, to his

aunt *Mackean*, but they refused to buy it. At length, at his desire, *Cole*, the plaintiff in the original cause, and defendant in the cross cause, entered into an agreement with *Martin* for the purchase of this contingent legacy. *Cole* was to give for this 500*l.* legacy, 100*l.* to be paid by 5*l. per annum*, at every *Christmas*, with a proviso, that if *Martin* should survive his aunt *Mackean*, then what should remain due of the 100*l.* should be paid him within a year after her death; but if the said *Martin* should die in the life-time of the widow *Mackean*, in such case the 5*l. per annum*, to continue payable yearly as aforesaid, until the 100*l.*, or what should remain due thereof, should be fully paid to the executors, administrators, or assigns, of the said *Martin*.

Martin went beyond sea; and hearing that his aunt *Mackean* was dead, returned to *England;* but before his return, and after his aunt's death, the plaintiff *Cole* brought his bill in this court against the executors of the testator, Mr. *Mackean*, to compel them to pay the 500*l.* legacy to him, as assignee thereof from *Martin;* and the executors controverted the payment, it having been assigned over by *Martin* to the plaintiff *Cole*, so much under the value.

Upon *Martin's* returning to *London* from beyond sea, he came to the plaintiff *Cole's* house, telling him, he was informed his aunt *Mackean* was dead, and that now the legacy of 500*l.*, which was before contingent, was become absolute; but that he the said *Martin* was fully satisfied with what he had done; and that, if he had not sold the legacy to the plaintiff *Cole*, he should have disposed of it to some other person for a less price; and being told by the plaintiff *Cole*, that he was at law with the executors of the testator, *Andrew Mackean*, for the recovery of the said legacy, (they having controverted the payment thereof to him) he *(Martin)* blamed the executors for refusing to pay the legacy, saying, he would speak to them about it, and that he was willing to [292] do any thing further to confirm the assignment, which he had before made of the said legacy to the plaintiff *Cole*.

Whereupon, some short time afterwards, a deed of confirmation of the former assignment was prepared by the plaintiff *Cole*, and read over to *Martin*. At the same time the bill brought by the plaintiff *Cole* for the legacy against the executors, and their answer to the bill controverting the payment thereof, was read to *Martin*, who, being fully apprised of every thing, did execute a deed of confirmation of the

COLE *v.* GIBBONS.

former assignment to *Cole*. Afterwards *Martin* brought this bill against *Cole* to be relieved against the assignment, and deed of confirmation. Upon a full hearing whereof, it was at first decreed by the Lord *King*, and afterwards upon a rehearing that decree affirmed by the Lord *Talbot*, that there being no fraud in obtaining the first assignment, which was at a subsequent time so deliberately confirmed, therefore the plaintiff *Martin* ought to be bound thereby.

It was objected, that here was a necessitous man selling this 500*l.* legacy for what was not near the value, for less than 100*l.*, nay, for the interest only of 100*l.*, payable for twenty years together; and several cases were cited out of Mr. *Vernon's Reports*, as also [C] some of a later date, where

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reversions were bought of heirs on contingencies to be void, if the heir should die in the life-time of the ancestor, all which purchases were set aside by this court; that as the original bargain was unreasonable, and fraud manifestly appeared on the face of it, so this fraud, with which it at first began, accompanied it throughout, and was sufficient to spoil the whole transaction. *Quod ab initio non valet, tractu temporis non convalescet.*

Unreasonable bargains made with an heir in his father's life-time, relieved against, and why.

But the Lord *Talbot* observed, that all those cases of heirs were immaterial to this point; for that the policy of the nation to prevent what was a growing mischief to ancient families, that of seducing an heir apparent from a dependence on his ancestor who probably would have supported him, and, by feeding his extravagancies, tempting him in his father's life-time, to sell the reversion of that estate, which was settled upon him; forasmuch as this tended to the manifest ruin of families; therefore the policy of the nation thought fit (though it at first prevailed with some [D] difficulty) to

[C] *Earl of Arglass* v. *Muschampe*, 1 *Vern.* 75. *Nott* v *Hill*, 1 *Vern.* 167. *Earl of Arglass* v. *Pitt*, 1 *Vern.* 239. *Berny* v. *Pitt*, 2 *Vern.* 14. See also the case of *Twisleton* v. *Griffith*, vol. 1. 310. since which was that of *Curwyn* v. *Milner*, heard 19th of *June*, 1731, before the Lord *King*, where an heir of about twenty-seven years of age, and who had a commission in the Guards, borrowed 500*l.* on condition to pay 1000*l.* if he survived his father and father-in-law; but if he died before his father or father-in-law, then the lender to lose the 500*l.* The heir survived his father and father-in-law, and was relieved, though after he had paid the money, it being for fear of an execution.

[D] It appears from the Register's book, that in the case of *Berny* v. *Pitt*, where the defendant had supplied an heir in his father's life-time with the two several sums of 1000*l.* and 1000*l.*, on condition to have 2500*l.* for each, if the heir survived his father, else the principal to be lost; and obtained two judgments from the plaintiff of 5000*l.* a-piece defeazanced for the payment of the said

put a stop to so mischievous a practice, by setting aside all these bargains with young heirs, (1) for reversions; but that in the principal case here was no heir concerned; and as it was in the power of *Martin*, when he was returned from beyond sea, informed of his aunt's death, and that the legacy of 500*l.* was become absolute, to confirm this first assignment, so he had done it.

His Lordship admitted, that had all depended on the first assignment, he would have set it aside, as being an unreasonable advantage made of a necessitous man; but seeing the said *Martin* was afterwards fully apprised of (2) every thing, had the executor's answer read to him, and yet chose to execute a deed of confirmation (*y*) of his former assignment: and since not the least fraud or surprize had appeared on the part of the defendant, it was, he said, too much for any court to set all this aside. [E] (3)

A subsequent deliberate act confirming an unreasonable bargain, when the party is fully informed of every thing, and under no fraud nor surprize, shall make the bargain good.

2500*l.* for each; the Lord *Nottingham* on the first hearing (9 *Feb.* 33 *Car.* 2.) granted relief only against the penalties; but on a rehearing before the Lord *Jeffereys*, (27 *Jan.* 2 *Jac.* 2.) though the plaintiff had been constrained, in obedience to the decree, to pay the defendant 5390*l.* yet the former decree was discharged, and the plaintiff ordered to be restored to the money paid *ultra* the 2000*l.* originally lent, and the interest for the same, with interest from the time the defendant had received it.

[E] The following anonymous case appears in another part of the reporter's manuscript to have been determined during the first time of the Lord *Cowper's* having the great seal, and it seems very applicable to the case above reported.

A man was caught in bed with another's wife; and the husband who caught him, having a sword in his hand, was about to kill the man, who was naked, and in the power of the husband. But upon the man's desiring the husband not to take that advantage of him, and saying, that he would make him reparation; thereupon they went into another room, where the man gave the husband a note for 100*l.* payable at a certain time. After which, the money growing due, the husband came for payment; and the man excusing payment, gave his bond for the money, and afterwards brought his bill to be relieved. The Lord *Cowper* de-

(1) Vide *Twisleton* v. *Griffith*, ante, 1 vol. 310.

(2) The party must be fully apprised of *his right to be relieved* against the original transaction. *Cole* v. *Gibson*, 1 Vez. 503. *Earl of Chesterfield* v. *Janssen*, 1 Atk. 301, and 2 Vez. 125. S. C. *Taylour* v. *Rochfort*, 2 Vez. 281. *Crowe* v. *Ballard*, 3 Bro. C. C. 117. and 1 Ves. Jun. 215. S. C. (*x*)

(3) The decree was affirmed, but the deposit returned to *Martin*. Reg. Lib. A. 1733. fol. 456. Vide *Earl of Chesterfield* v. *Janssen*, 1 Atk. 301. and 2 Vez. 125. S. C.

(*x*) S. C. 2 Cox 253, *Roche* v. *O'Brien*, 1 Ba. & Be. 330. *Dunbar* v. *Tredennick*, 2 Ba. & Be. 304.

(*y*) As to the effect of confirmation, vide *Osmond* v. *Fitzroy*, ante, 131. n. (1).

clared, that if the matter had rested on the note, which was gained by a man armed, from one naked, and by duress, though it happened to be given in satisfaction for the greatest injury, (in which case, however, the utmost remedy the law would have given had been damages to be ascertained by a jury) he should have made no difficulty of granting relief; but when afterwards the plaintiff had coolly, and without any pretence of fear or duress, entered into a bond to the husband, he had thereby himself ascertained the damages, and ought not to be relieved.

Case 74.

TANNER *v.* WISE.

On a Rehearing from a Decree of the Lord Chancellor King.

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Lord Chancellor TALBOT.

Ca. temp. Tal. 284.
2 Eq. Ca. Ab. 304. pl. 27.
The words [I devise all my temporal estate] the same as [I devise all my worldly estate] pass a fee; and this the plainer, where it is afterwards said, all the *rest* of my real estate, the word *rest* being a term of relation.

THE testator's will was in this manner: In the name of God, *Amen*. As to all my temporal estate with which it has pleased God to bless me, I dispose of the same as follows: I will that my debts be paid; after which he disposed of several pecuniary and other personal legacies, gave 4*s*. *per* week to a relation for her life; then came these words: "All "the rest of my estate, goods, and chattels whatsoever, real "and personal, I give to my beloved wife, whom I make my "executrix." The testator died possessed of leases for years, and seised of lands of inheritance in fee-simple.

The bill was brought by the heir at law of the testator, suggesting, that the testator's widow had all the writings and title deeds relating to the inheritance of the lands of which the testator died seised; and that those writings belonged to the heir, who was entitled to the lands. The defendant, the widow, by her answer insisted, that all the real estate of the testator was by the said will devised to her in fee-simple.

This cause was brought to a hearing before the Lord Chancellor *King*, who decreed, that as the plaintiff was the testator's heir at law, all deeds and writings relating to any part of the testator's estate should be brought before the

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Master for the plaintiff, the heir at law, to have the (1) in-

(1) Vide *Earl of Suffolk* v. *Howard*, ante, 2 vol. 177. *Bettison* v. *Farringdon*, post. 363.

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spection thereof, who should be at liberty to bring an ejectment; and that the defendant who claimed under the will should not give in evidence any dormant term or incumbrance.

Afterwards the plaintiff, the heir at law, had a rehearing on a petition, and objected, that here were no lands of inheritance by express words devised by the will; nor did it appear, that the testator intended to pass any part of his real estate; that the words *all my temporal estate* might be satisfied by being construed to dispose of the testator's personal estate only, particularly his leases for years, which were in their nature temporary, and would wear out in time. And since it was at least doubtful, whether the testator intended hereby to pass his real estate; by doubtful words an heir was not to be disinherited. Besides, this case relating to a title of land and depending entirely upon the words of a will, was more proper to be determined in equity, than by a judge and jury at *nisi prius*.

Lord Chancellor. I think this decree is right; and that it was sufficient to direct, that the writings should be produced before the Master, and no dormant incumbrance given in evidence against the plaintiff. Though it seems but a slight equity for an heir to say, he wants writings, when his title *as heir* stands in need of no writings, unless he claims under some deed of intail concealed by the widow or executor.

But a slight equity for an heir at law to say, he wants the writings; unless he claims under some deed of intail concealed from him by the defendant.

It is true, where a title depends upon the words of a will only, I do not see but this court may determine it, as well as a judge and jury. *Notwithstanding which, if either party has a mind to go to law, with the directions that have been given by the decree, I will not hinder them: but if both parties are desirous to have my opinion touching the title, I am ready to give it. Upon which the counsel on both sides declaring, that they should willingly acquiesce to the judgment of the court, his Lordship delivered his opinion, that a fee passed by this will to the widow of the testator.

Where a title depends on the words of a will, this is as properly determinable in equity, as by a judge and jury at nisi prius.

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First, For that though it had been objected, that the words *temporal estate* did more properly refer to personal estate, and especially to leases for years, (which, comparatively speaking, are but of short continuance) and not to an estate of inheritance, which is permanent, and may last for

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ever; yet here this expression seemed to have been made use of in the will in contradistinction only to the testator's *eternal concerns*, which every man, at the time of making his will, is naturally supposed to have in view; so that the words *temporal estate* signify the same as *worldly estate*, or all that a man has in the world (*a*), and consequently take in both real and personal estate.

(*a*) 2 Vern. 687, 690.

In the next place where the testator had said, that as to all his temporal estate he disposed of the same as followed; and, after having given several legacies, proceeded to devise the rest and residue of his estate, goods, and chattels, real and personal; these words, *rest* and *residue*, are words of relation, and must refer to some estate before mentioned in the will, if any such there were. Now, in this case, there was an estate mentioned before by the testator, (*viz.*) his temporal estate, which brought it to signify the same, as if
[298] the testator had said, " I devise the rest and residue of all my temporal estate," which, without the word *heirs*, would have sufficed to pass all his real estate.(1)

Wherefore the Lord Chancellor with great clearness decreed, that all the real estate did well pass by this will to the testator's wife and her heirs.

(1) Vide *Barry* v. *Edgeworth*, ante, 2 vol. 523.

Case 75.

LILLY *v.* OSBORN.

Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 115. pl. 11. One not in debt, nor then a trader, makes a voluntary settlement on a child, and afterwards becomes a trader and a bankrupt; this settlement not liable to the bankruptcy.

ONE purchased a copyhold, and took a surrender of it to the use of himself for life, remainder to the use of his wife for life, remainder to the use of trustees for twenty-one years, to raise 80*l.* for his daughter, remainder to the use of himself in fee. At the time of this purchase, the purchaser was no trader, nor owed any debts; but afterwards he engaged in trade, contracted debts, and about sixteen years after became a bankrupt. Whereupon a commission was taken out against him; and his wife dying, the commissioners assigned over the copyhold premises, which the assignees sold to the defendant, allowing him to detain in his hands the 80*l.* in

order to answer it to whomsoever it should be adjudged due. And the only question was, whether this was within the clause in the statute of 1 *Jac.* 1. *cap.* 15. *sect.* 5. where it is said, "that if any person which hereafter is or shall be a "bankrupt, shall convey, or procure, or cause to be conveyed "to any of his children, any lands or tenements, goods or "chattels,(*x*) except the same be purchased, conveyed, or [299] "transferred, for or upon marriage of any of his or her "children, or some valuable consideration; it shall be in the "power of the commissioners to dispose of the same, as "if the bankrupt had been actually seised or possessed "thereof."

And it was objected, that this came exactly within the words, being a provision for a child, and merely voluntary, without any consideration, as against creditors. To which opinion at first inclined the Master of the Rolls.

But afterwards, upon citing the case of *Crisp* v. *Pratt*, *Cro. Car.* 549. where it appeared that the person supposed to be a bankrupt had settled a copyhold estate on himself, his wife and his son, and the heirs of his son; and the person at that time not being in debt, but a clear man, not then so much as a trader, and the settlement being two years before he was concerned in trade, and six years before any act of bankruptcy committed by him: in that case, the court of *B. R.* (*viz.*) three judges against *Berkeley*, held it not within the act. Accordingly in the principal case, considering the party was not so much as a trader when he made the settlement, the Master of the Rolls was clear, that the said settlement was not liable to the bankruptcy.(1)

(1) But if the party be a *trader* at the time of the purchase, &c. it seems that his *solvency* will not protect the transaction from the operation of the statute. *Fryer* v. *Flood*, 1 Bro. C. C. 160.(*y*)

(*x*) Money is not within the statute, *Ex parte Shorland*, 7 Ves. 88. *Kensington* v. *Chantler*, 2 M. & S. 36.

(*y*) *Walker* v. *Burrows*, 1 Atk. 93. *Glaister* v. *Hewer*, 8 Ves. 200 & 204.

Case 76.

STUDHOLME *v.* HODGSON et al'.

Lord Chancellor TALBOT.

Testator devised a term for years and all his personal estate to A. an infant, and if A. died during his infancy, and his mother should die without any other child, then to B. A. died during his infancy, though the mother was living, and might have a child; yet the court aided B. the devisee over, by directing an account and discovery of the estate, in order to secure it, in case the contingency should happen.

THE bill was to have the benefit of a contingent devise of a personal estate secured to the plaintiff, and for an account of the same. *Michael Studholme*, being possessed of several long exchequer annuities, granted by parliament for ninety-nine years, to the value of 250*l. per annum*, and having an illegitimate daughter, the defendant *Mary*, married to his kinsman *Cuthbert Hodgson*, another defendant, and having no lawful issue, and having a nephew, a brother's son, *(viz.)* the plaintiff *William Studholme*, made his will dated 26 *July*, 1711, thereby devising to *Michael Hodgson*, the son of the defendant *Hodgson* and *Mary* his wife, all his exchequer annuities for the residue of his term therein; with directions, that all the proceed thereof from time to time should be placed out at interest, and out of such interest that *Michael Hodgson*, the defendant's son, should be maintained and educated till his age of twenty-one, at which time all the proceed and profits thereof, and the principal money so placed out, together with the interest thereof, should be paid to the said *Michael* the son: but in case the said *Michael* should die before twenty-one, then the testator devised, that all the annuities given to the said *Michael*, should go to his mother *Mary Hodgson*, and to such other child or children as she should thereafter have, share and share alike; and for want thereof, to her executors, administrators, and assigns. He gave several leasehold houses in St. *James's* to the defendant *Mary Procter* for her life, remainder to *Michael Hodgson*, the infant son, if he lived to twenty-one; otherwise to such other children as the said *Mary Hodgson* should have, equally; and for want of such children, then to the said *Mary* his mother, her executors and administrators; and the said testator did thereby give a moiety of his plate to the said *Michael Hodgson* the infant, and the other moiety, together with the rest of his goods at his house at St. *James's*, to the defendant *Mary Procter*. As to his house in *Dover*, he devised the same to the said *Michael Hodgson* the infant and his heirs, and gave all the rest of his real and personal estate to the said *Michael Hodgson*, his heirs, executors, administrators and assigns for ever, making the said *Mary Procter* executrix.

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20th of *September* 1715, the testator made a codicil, thereby giving to the defendants *Cuthbert Hodgson* and *Mary* his wife 50*l. per annum*, for their lives, and the life of the survivor of them, to be issuing out of the said exchequer annuities. Also he gave them the said house in *Dover* for their lives and the life of the survivor, and 50*l. per annum*, out of the said exchequer annuities to the said *Mary Procter* his executrix for her life; and reciting, that he had by his will given to the said *Michael Hodgson* all his exchequer annuities, in case he should live to twenty-one, and if he died before, then to his mother *Mary;* and also that he had given to the said *Michael Hodgson* several leasehold houses in St. *James's*, if he attained twenty-one, if not to such other children as the said *Mary Hodgson* should have; and for want of such, then to the said *Mary*, her executors, &c. and had also given to the said *Michael Hodgson* and his heirs his house at *Dover*, one moiety of his plate, and the residue of his real and personal estate: the testator by his said codicil declared, that in case *Michael Hodgson* the son should die before twenty-one, and the said *Mary* his mother should die *without any other children or child by the said* Cuthbert Hodgson *her husband*, then all the legacies and bequests of the said annuities, houses, lands, and premises, should go, be paid, descend, and come to the testator's nephew the plaintiff *William Studholme*, his heirs and assigns for ever: soon after which the testator died.

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The infant son *Michael Hodgson* died within a few days before his age of twenty-one; and *Mary* his mother being forty years of age, and her husband above fifty, and having no child, the plaintiff *Studholme*, the devisee over, brought his bill for an account of the said testator's personal estate, and to have the same secured and set apart, to the end that in case the contingency of the death of the defendant *Mary Hodgson* without children should happen, the plaintiff might receive the same according to the directions of the said will; and that in the mean time the money arising from the rents and profits of the said personal estate might be placed out on securities, in order to wait the event of the said contingency; and that all the writings relating to the real and leasehold estate might be brought before the Master.

For the defendants it was said, 1*st*, that as to the leasehold, the exchequer annuities, and other personal estates, the bill was not proper; since the plaintiff at that time had

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not the least pretence of right, and possibly might never have any; nay, that it was rather to be presumed he never would; the presumption of law being, that *no one will die without issue,* for which reason it supposes an estate tail may last for ever; and, therefore, if an estate should be given to *A.* and his heirs as long as *B.* shall have any issue of his body, this would be a fee-simple in *A.* That suppose some

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years hence (or very soon, as it might happen,) the defendant *Cuthbert Hodgson,* by *Mary* his wife, should have issue, what should become of these costs which the parties the defendants will have been then unnecessarily put to? and 1 *Vern.* 105, *Sackvill* v. *Aylworth,* was cited, where a bill was brought in a lunatic's lifetime, by his devisee, to prove his will, and to perpetuate the testimony thereof: but it was determined, that the bill would not lie, because such devisee, in the life of the testator, had neither *jus in re* nor *ad rem,* had not at that time, and possibly never might have, any sort of right; also the lunatic, the testator, might recover from his lunacy and make another will; both which reasons were applicable to the present case, and made against this bill: for the plaintiff here had neither *jus in re* nor *ad rem,* and by possibility never might have any. Again, as the lunatic in the case cited might recover, so the devisee for life in the principal case might have issue; and as that bill was, for the reasons that have been mentioned, held improper, so (it was conceived) the present bill, on the like considerations, would be deemed improper also.

Where a bill is brought to secure and have the benefit of a contingent interest devised over; the costs shall be paid out of the assets of the testator, who by his will has occasioned the difficulty.

But by the *Lord Chancellor.* As to what has been objected concerning the costs, these ought clearly to be paid out of the assets of the testator, who by his will has occasioned the difficulties.(*x*) Here is a possibility at least of a right's coming to this contingent devisee, and it is reasonable that all rights, such as they are, whether vested or contingent, should be preserved. On the death of *Mary Hodgson* the mother, it will be determined, whether this right will ever vest or not, which has been adjudged not too remote a distance of time. If the defendants were not to be called to

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an account in their lifetime, they might waste and embezzle every thing; and that estate which at present may be easily accounted for, in process of time, *(viz.)* at the death of the

(*x*) So *Jolliffe* v. *East,* 3 Bro. C. C. 349. *Pearson* v. *Pearson,* 1 Sch. & 27. *Barrington* v. *Tristram,* 6 Ves. Jef. 12.

defendant *Mary Hodgson*, may be impossible to be discovered; by which means the devisee over may be deprived of his right, and the intentions of the testator defeated; and though there may be these inconveniencies on the one side, I, for my part, am able to foresee none on the other. In the case of *Staines* (*a*) v. *Maddox*, (where the bill was for securing a like contingent right) the Master of the Rolls made a decree of this nature, which was affirmed by the Lord Chancellor *King*, and his Lordship's decree affirmed in parliament.

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(*a*) Vol. 2. 421.

The second question was, whether the devise over of the exchequer annuities and leasehold houses, and more especially of a moiety of the plate and residue of the personal estate, was good?

One devises a term for years to A., and if A. dies without a child, then to B.; this is a good devise to B. upon such contingency.

And it was objected, that in the case of a devise of a chattel real or personal to one, and if he die without issue, the remainder over, such remainder must be admitted to be void; and in the present case the devise over was, "if *Mary* "the infant's mother should die without any other children "or child by the said *Cuthbert Hodgson*;" which words *child* and *issue* are synonymous, every child being an issue, and every issue a child. Moreover, the last devise by the codicil being in case *Mary* the mother should happen to die without any other children or child, then to the plaintiff *Studholme* and his *heirs*; no estate ought to pass by those words, but what can descend to heirs, especially since the testator had some fee-simple estate, *(viz.)* the house at *Dover*, which would satisfy the devise, without carrying the personal estate; that indeed, as to the exchequer annuities and leasehold houses, they, being expressly devised, must pass by the codicil to the plaintiff, in case the devise over were good.

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Sed per Cur. There can be no doubt but that the devise over to the plaintiff, in case *Mary* the mother should die without any other child by her husband, is good (1) upon that contingency; and then, as to the question, how much shall be comprehended therein, it is observable, that not only the exchequer annuities and leasehold are expressly devised, but all the premises; and the intention of the codicil was, in case *Michael* the infant son should die before twenty-one,

(1) *Hughes* v. *Sayer*, ante, 1 vol. 534.

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&c. that then the testator's nephew, the plaintiff *Studholme*, should be put in the place of the said *Michael*.

The last point was, touching the intermediate interest of the residue. And here it was insisted, that the same belonged to *Mary* the mother by a necessary implication, and it was compared to the devise of a freehold estate to the testator's heir at law after the death of *J. S.* in which case it was manifest the heir at law could not have it sooner; consequently, *J. S.* would in the mean time be entitled to the premises for his life. *Vaugh.* 259. *Gardiner* v. *Sheldon.*

Sed per Cur. In the case cited the testator had declared his intention, that the heir at law should not have it sooner; and there the freehold could not be kept in abeyance, but must vest in somebody; whereas in the present case, there is no such rule with regard to personal estates, which may remain in suspence. Wherefore the profits of the residue

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from the death of *Michael*, till the contingency happens, (*y*) are to accumulate and be added to the capital; and if no child of the defendant *Mary* by her husband *Cuthbert*, then to go to the plaintiff.(2)[F]

[F] *Thomas Green*, Esq. possessed of a large personal estate, and having a daughter by a first wife, and a daughter by a second wife, and having no son, bequeathed his personal estate (subject to the payment of several legacies) to his daughter by his second wife, and if she should happen to die before her age of twenty-one, or marriage, and his daughter by his first wife should have one or more sons, he bequeathed his said personal estate unto such son as should first attain his age of twenty-one; and in case his said daughter by his first wife should have no son that should attain the age of twenty-one, then he gave his said personal estate to *J. S.* The daughter by the second wife died under her age of twenty-one, and unmarried; the daughter by the first wife had a son, during whose infancy, and on whose behalf, a bill was brought *(inter al')* to have the produce of the personal estate placed out at interest, and improved for the plaintiff's benefit. Upon hearing the cause it was insisted, that either the plaintiff, the infant himself, or his mother, were entitled to the intermediate profits: but the court, agreeably to the Lord *Talbot's* opinion and decree in the above-mentioned case, did declare, that all the interest, income and profits that had arisen or should arise from the said estate, from the death of the testator's daughter by his second wife, ought from time to time to be accumulated, added to, and go along with the surplus; and that in case the plaintiff should die before his age of

(2) But the interest of the residue accrued in the life-time of *Michael* *Hodgson* was declared to be part of his personal estate. Reg. Lib. B. 1733. fol. 480. Vide *Nicholls* v. *Osborn*, ante, 2 vol. 419.

(*y*) See *Taylor* v. *Johnson*, ante, 2 vol. 506 n. (1). *Thellusson* v. *Woodford*, 4 Ves. 320.

twenty-one, the interest and income, together with the surplus, ought to go and belong to such person and persons as should be entitled thereto, according to the directions and contingencies mentioned in the testator's will. *Green* v. *Ekins*, heard before the Lord *Hardwicke*, *December* 6, 1742. 2 Atk. 473.

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Case 77.

Lord Chancellor TALBOT.

Where a man purchases an estate, pays part, and gives bond to pay the residue of the money; notice of an equitable incumbrance before payment of the money, though after the bond, is sufficient.

A. PURCHASED an estate, and having paid down part of the purchase money, gave bond for the residue. The plaintiff had an equitable lien on the purchased premises, of which the defendant alleged he had no notice at the time of making his purchase, but was apprised thereof before payment of the money due on the bond. And it was contended, that this notice was not material, since the giving the bond was as payment; and the purchaser, after he had given his bond for payment of the purchase money, is bound in all events to proceed, and cannot plead at law that there is an equitable incumbrance on his purchased premises.

Lord Chancellor. If the person who has a lien in equity on the premises, gives notice before actual payment of the purchase money,(1) it is sufficient; and though the purchaser has no remedy at law against the payment of the residue, for which he gave his bond, yet he would be entitled to relief in equity, on bringing his bill, and shewing, that though he has given his bond for payment of the residue of his purchase money, yet, now he has notice of an incumbrance, under which circumstances the court would stop payment of the money due on the bond. This the Lord Chancellor declared, though in the principal case there was proof of a notice precedent to the purchase, by a letter read to the purchaser, mentioning the equitable lien on the premises.

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Where the thing assigned is only a chose en action, though the assignment be without notice; yet as no legal estate passes, qui prior est in tempore, potior est in jure.

Also in this case there were two executors that were moreover residuary legatees; and one of them, for a valuable consideration, assigned over *part* of his residuary share to

(1) So, *Story* v. *Lord Windsor*, 2 Atk. 630. *Hardingham* v. *Nicholls*, 3 Atk. 304. (*x*) Or before the execution of the conveyance, though the purchase-money be actually paid. *Wigg* v. *Wigg*, 1 Atk. 384.

(*x*) *Maundrell* v. *Maundrell*, 10 Ves. 271. *Taylor* v. *Baker*, 5 Price 306.

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J. N., after which for a valuable consideration likewise, he assigned over his *whole* residuary share to the other executor and residuary legatee, who (as it was said) had no notice of the former assignment.

If there be two executors, who are also residuary legatees, and one of them, for a valuable consideration assigns part of his residuum to A., and afterwards, for a valuable consideration, assigns his whole residuum to the other executor; if both are but choses en action, the first assignment must take place. (*a*) See vol. 2, 496. Brace *v.* Duchess of Marlborough.

Whereupon it was insisted, that this legacy of the surplus was a *chose en action*, good only in equity, and not at law; in which case the assignment that was (*a*) prior in time must take place, consequently, the assignment made to *J. N.* would prevail.

To which it was answered, that though a legacy be a *chose en action*, yet, when it is assigned to an executor, (as the last assignment was) he, having a remedy at law, is in a different situation from a third person.

Lord Chancellor. I do not see any difference; for the thing assigned is still but a *chose en action*, which the executor himself cannot come at, unless by action or suit, either in law or equity.

It seems, if it had been a mortgage made to the testator, and assigned by one of the executors to the other, the latter
[309] might have entered; but in the principal case the assignment was but of 1200*l.* due upon all the mortgages made to the testator from *A. B.* the father, and *A. B.* the son, which not being recoverable otherwise than by a suit in equity, was clearly a *chose en action*.(1)

(1) Reg. Lib. B. 1733. fol. 461. by the name of *Tourville* v. *Spelman*.

Case 78.

WYCH *v.* EAST INDIA COMPANY.

Lord Chancellor TALBOT.

An executor, administrator, or trustee for an infant neglects to sue within six years; the statute of limitations shall bind the infant.

THE *East India* company were bound by contract to make an allowance of two rupees *per cent.* to the plaintiff's intestate, for which the plaintiff, the administrator *de bonis non* of his father, brought a bill. The intestate, with whom the company made the contract, was then beyond sea, and there died, leaving an infant son of tender years. Upon the death of the intestate, administration was granted to *A.* until the

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said son should come to twenty-one, *ad usum et commodum* of the infant, who at that time was about ——— years of age. The administrator in trust for the infant never commenced any suit on this contract; but the son within six years after his attaining twenty-one, brought this bill against the company, who pleaded the statute of limitations, *(viz.)* that the cause of action did accrue above six years before the suit commenced.

Whereupon it was argued, that as the time did not run against the father, with whom the contract was made, because he was beyond sea, and died there; so after the death of the father the son was an infant, and ought not to be barred or prejudiced by the neglect or default of his trustee, the administrator during his minority.

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Lord Chancellor. The administrator during the infancy of the plaintiff had a right to sue; and though the *cestuy que trust* was an infant, yet he must be [G] bound by the trustee's not suing in time; for I cannot take away the benefit of the statute of limitations from the company, who are in no default, and are entitled to take advantage thereof as well as private persons; since their witnesses may die, or their vouchers be lost. And as to the trust, that is only between the administrator and the infant, and does not affect the company. So where there is an executor in trust for another, and the executor neglects (*y*) to bring his action within the time prescribed by the statute, the *cestuy que trust*, or residuary legatee, will be barred; therefore, allow the plea.(1)

A corporation shall have the benefit of the statute of limitations, as well as any private person.

[G] In the case of *The Earl* v. *The Countess of Huntingdon*, *Hil.* 1719, the Lord Chancellor *Parker* was of opinion, but did not then determine the point, that a fine and five years non-claim should, in favour of a purchaser, bar a trust term, though the *cestuy que trust* was an infant.(*x*)

(1) Reg. Lib. B. 1733. fol. 448.

(*x*) Secus if the purchaser had notice of the trust, *Kennedy* v. *Daly*, 1 Sch. & Lef. 379.

(*y*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 629. *Pentland* v. *Stokes*, 2 Ba. & Be. 74. Sed vide *Lechmere* v. *Earl of Carlisle*, ante, 215.

Case 79. WYCH *v.* MEAL.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 78. pl. 8. The secretary and book-keeper of the East-India Company were made defendants to a bill for a discovery of some entries and orders of the company; the defendants demurred, for that they might be examined as witnesses; also because their answer cannot be read against the company; the demurrer over-ruled, lest there should be a failure of justice, in regard the company are not liable to a prosecution for perjury, though their answer be never so false.

IN a bill brought by the plaintiff against the *East India* company, one of the officers of the company was made a defendant, in order to discover some entries and orders in the books of the company.

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11. Sim. 308.
2. Eq. 661.
3. — 731.
2. Ch. 567.

The defendant demurred, shewing for cause that it was not so much as pretended by the bill, that he was any way interested in the matter in question; and that his answer, if it were to be put in, could not be read against the company; as the answer of one defendant [H] cannot be made use of against the other; that the plaintiff, if he pleased, might examine the defendant as a witness; that by the same reason, the plaintiff might make the servant of any private person a defendant; and that it was plain the plaintiff could have no decree against the defendant, the officer of the company. [I]

Lord Chancellor. This is a thing of consequence, which I do not remember to have been ever judicially determined; but so far is plain, that the plaintiff is entitled to, and ought to have, a discovery of the matters charged in the bill. It

[H] One reason, amongst others, why the answer of one defendant cannot be made use of against another, seems to be, because, if that were allowed, I might make a friend co-defendant, who might put in an answer in my favour, and the other defendant would have no opportunity of cross-examining to it. (*u*)

[I] It is a general rule, that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree (*x*): thus a residuary legatee need not be made a party; and for the same reason, in a bill brought by the creditors of a bankrupt against the assignees under the commission, the bankrupt himself need not be made a party. By the Master of the Rolls, *De Golls* v. *Ward*, *Hil.* 1732. Though with regard to making the bankrupt a party, it seems formerly to have been held otherwise. See 2 *Vern.* 32. And however the rule laid down by the Master of the Rolls may hold in general, yet the determination of the Lord *Talbot*, on the particular circumstances of the case above reported, appears to have been founded on great reason and justice.

(*u*) *Morse* v. *Royal*, 12 Ves. 361. S. C. stated, 2 Ves. J. 643. *Lloyd* v. *Lander*, 5 Mad. 282. *Smith* v. *Snow*, 3 Mad. 10.

(*x*) *Whitworth* v. *Davis*, 1 V. & B. 545. *Griffin* v. *Archer*, 2 Anst. 478.

is a different case where a private person and where a company are defendants; for the latter can answer no otherwise than under their common seal; and though they answer never so falsely, still there is no remedy against them for perjury. It has been an usual thing for a plaintiff, in order to have a discovery, to make the secretary, book-keeper, or any other officers of a company, defendants, who have not demurred, but answered; whereas, if this demurrer should be allowed, the officers of companies are never likely to answer again; and though the plaintiff be entitled to a discovery, he would never be able to get one, consequently, there would be a failure of justice.

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Besides, notwithstanding the answer of the defendant the officer cannot be read against the company, yet it may be of use to direct the plaintiff how to draw and pen his interrogatories, towards obtaining a better discovery; and since no instance is produced, where such demurrer has been allowed, and it may be very mischievous and injurious to the subject, by allowing thereof, to deprive them of that discovery, to which in common justice they are entitled; and as on the other hand no manner of inconvenience can ensue from obliging (1) such officers of a company to answer; therefore, overrule the demurrer. (2)

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(1) And so the practice has continued, vide *Moodamay* v. *Morton*, 1 Bro. C. C. 469. (*y*)

(2) Reg. Lib. B. 1733. fol. 467.

(*y*) *Fenton* v. *Hughes*, 7 Ves. 288. *Dummer* v. *The Corporation of Chippenham*, 14 Ves. 245. *Le Texier* v. *Margravine of Anspach*, 15 Ves. 159. *Gibbons* v. *The Waterloo Bridge Company*, 5 Price 491.

2. Ch. 35.

EX PARTE BRUNKER.

Case 80.

Lord Chancellor TALBOT.

A writ of ne exeat regno ought not to be granted without a bill first filed.

THE Master of the Rolls, upon a petition *ex parte*, granted a *ne exeat regno* against *J. S.* (against whom the plaintiff *Brunker* had recovered a verdict at the sittings after this last term) upon strong affidavits, that the said *J. S.* between

Ex parte BRUNKER.

this and *Michaelmas* term then next, (before which time the plaintiff could have no judgment) threatened to go beyond sea; and this writ was granted, though no bill had been filed, upon a precedent produced of the Lord *Cowper*'s in 1709.

[313] And now, on motion to supersede this writ, and discharge the defendant, who had been taken into custody by virtue thereof, it was urged in support of the order at the Rolls, that the writ of *ne exeat regno* was in the register, and at common law, and though originally a state writ, yet now was made use of in aid of the subjects, to help them to their just debts; and being a writ at common law, it stood in no need of the authority or interposition of this court.

Lord Chancellor. In all my experience I never knew this writ of *ne exeat regno* granted, or taken out, without a [K] bill in equity first filed. It is true, it was originally a state writ, but for some time (though not very [L] long) it has been made use of in aid of the subjects, for the helping them to justice; but still, as custom has allowed this latter use to be made of it, it ought to go no further than can be warranted by usage, which always has been to have a bill first filed. The precedent cited in the Lord *Cowper*'s time was but a single one, and passed *sub silentio*. Neither does it appear, that any use was made of that writ, or that the party

[314] defendant was ever taken upon it; so that this alone is not sufficient to overturn what has been the constant settled practice; and there is the greater reason that this writ should be taken out and granted with caution, as it deprives the subjects of their liberty: neither ought it to be made use of, where the demand is entirely at law; for there the plain-

Nor where the demand is entirely at law, in regard there the plaintiff has bail.

[K] Yet see the case of *Lloyd* v. *Cardy*, *Precedents in Chan.* 171. where a *ne exeat regno* was granted on affidavits, by the Master of the Rolls (Sir *John Trevor*,) in the absence of the Lord Keeper *Wright*, though there was no bill in court whereon to ground the writ; which report of the case is warranted by the Register's Book.

[L] Towards the latter end of the reign of King *James* the First, this writ was thought proper to be granted, not only in respect of attempts prejudicial to the King and state, (in which case the Lord Chancellor granted it on application from any of the principal secretaries, without cause shewing, or upon such information as his Lordship should think of weight) but also in the case of interlopers in trade, great bankrupts in whose estates many subjects might be interested, in duels, and other cases that did concern multitudes of the King's subjects. See the Lord *Bacon's Ordinances*, No. 89.

tiff has [M] bail; and he ought not to have double bail, both at law and in equity. (1) Ex parte Brunker.

Whereupon the writ was superseded, and the defendant discharged out of custody. (2)

[M] So held by the Lord *King*, in the case of *Pakeman* v. *Cosby*, where, because the plaintiff had brought his action against the defendant, and had bail, the writ was discharged. Last seal after *Hilary* term, 1730.

(1) So, *Anon.* 2 Atk. 210. (*x*)

(2) Reg. Lib. A. 1733. fol. 457.

(*x*) *Ex parte Duncombe*, 2 Dick. 503. *Crosley* v. *Marriott*, 2 Dick. 609. Though in a case of account a plaintiff is entitled to the writ, *Jones* v. *Sampson*, 8 Ves. 593. *Hannay* v. *M'Entire*, 11 Ves. 54. *Blaydes* v. *Calvert*, 2 J. & W. 211. and see *Done's case*, ante, 1 vol. 263. as to this writ generally.

ANONYMOUS.

Case 81.

A motion was made by the Attorney-General to discharge an order of the Master of the Rolls, for filing an original *nunc pro tunc* to make good a judgment, after a writ of error brought. Lord Chancellor Talbot.

The court will not order the filing an original to make good a judgment on error brought, without some excuse for not filing one before; though a slender excuse may be sufficient.

On the other side it was urged, that a court of law, and much more of equity, ought to favour any thing that tended to support a judgment, which must be supposed to have been obtained for a just demand; and therefore at law, if there is any mistake in a writ of error to reverse a judgment, let the mistake be never so trivial, yet, it being to reverse a judgment, the court will not amend it. [N]

[N] The statute of 8 *H.* 6. for the amendment of records is exclusive of a writ of error, that going more in reversal than in affirmance of a judgment; and the intent of the act was, to support original judgments, and to avoid writs of error. *Carth.* 368, 520. But there is a further reason to be given, why a writ of error is in no case amendable, because it is the commission to the court, and the court cannot amend their own commission. See *Salkeld* 49, *Thompson* v. *Crocker*. It may be likewise observed, as material to this purpose, that, after *in nullo est erratum* pleaded, the plaintiff in error cannot have a *certiorari ex debito justitiæ;* and as it is discretionary in the court, they will award it in order to affirm, but never to reverse, a judgment, or make error. *Salk.* 269. *Carlton* v. *Mortagh*.

ANONYMOUS.

Lord Chancellor. Though a slight excuse might be sufficient to induce me to make an order for leave to the plaintiff to file an original *nunc pro tunc*, still some excuse there ought to be; otherwise no person will file an original, until he shall have been forced (*a*) to it by a writ of error; and this will be in a manner to give away the small revenue of the Crown upon original writs, which the King's courts ought not to do. And thereupon his Lordship discharged the Master of the Rolls's order for filing the said original; the consequence of which was, that the judgment was reversed upon a writ of error. (1)

(*a*) See vol. 1. 412.

(1) Vide *Pengree* v. *Jonas*, 2 Bro. C. C. 141.

Case 82.

PUSEY *v.* SIR EDWARD DESBOUVRIE.

Lord Chancellor TALBOT.

2 Eq. Ca. Abr. 270. pl. 24.

SIR *Edward Desbouvrie* was a freeman of *London*, and possessed of a very great personal estate. He had a wife, with whom he had compounded as to her customary part; and had a son, (the defendant) to whom he had given very considerable sums of money, in order to enable him to trade. He had also one daughter.

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Where a daughter of a freeman of London accepts of a legacy of 10,000*l.* left her by her father, who recommended it to her to release her right to her orphanage part, which she does release accordingly; if the orphanage part be much more than her legacy, though she were told she might elect which she pleased; yet, if she did not know she had a right first to enquire into the value of the personal estate, and the quantum of her orphanage part, before she made her election; this is so material, that it may avoid her release.

The father made his will, giving (*inter al'*) to his daughter 10,000*l.*, upon condition that she should release her orphanage part, together with all her claim or right to his personal estate by virtue of the custom of the city of *London*, or otherwise, and made his son executor, his daughter being about the age of twenty-three years.

After the father's death it was agreed between the daughter and her brother, that she should accept of her legacy of 10,000*l.* and upon the terms whereon it was given her by her father's will, that is, she to release all her right by virtue of the custom, &c. which release was accordingly prepared, and before she executed it her brother informed her that she had it in her election to have an account of her father's personal estate and to claim her orphanage part, and her uncle was then present. But the daughter at that time

declared she would accept of the legacy left her by her father, that being a sufficient provision for any young woman; and thereupon she executed the release, being then about twenty-four years old, and the brother paid to her the 10,000*l.* and interest. The daughter afterwards married one Mr. *Pusey*, an attorney at law, who brought a bill to set aside this release, charging that the personal estate of which the father died possessed was much above 100,000*l.*, the daughter's share of which by the custom would amount to upwards of 40,000*l.*; that the mother having been compounded with for her customary part, the freeman's personal estate was to be distributed as if there was no wife, consequently the dead man's part was one moiety, and the children's part the other; and that the brother, the defendant Sir *Edward Desbouvrie*, had been advanced in his father's lifetime by his father at different times, with several [O] great sums of money, the whole whereof would amount to a full advancement of the son: so that the plaintiff *Pusey*, in right of the daughter his wife, was entitled to a moiety of her father, the freeman's personal estate.

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The defendant, the brother, pleaded this release.

Against which, on behalf of the plaintiff at first it was argued, that as the bill was brought to set aside this release, the defendant ought not to be admitted to plead it in bar, the rule being *non potest adduci exceptio ejusdem rei cujus petitur dissolutio*. But the Lord Chancellor here interrupted the counsel, saying, this was every day's practice; and that otherwise no release or award could be pleaded to a bill that was brought to set aside the same.(z)

Then it was urged, that no computation or account had as yet been taken of the father's personal estate, and that it

[O] With regard to the advancement of a child, it has been determined that small inconsiderable sums occasionally given to a child cannot be deemed an advancement, or part thereof. Thus, maintenance money, or an allowance made by a freeman to his son at the University, or in travelling, &c. is not to be taken as any part of his advancement, this being only his education; and it would create charge and uncertainty to enquire minutely into such matters. So, putting out a child apprentice is no part of his advancement, for it is only procuring the Master to keep him for seven years instead of the parent. *Hender* v. *Rose*, at the Rolls, *Trin.* 1718. But the father's buying an office for the son, though but at will, as a gentleman pensioner's place, or a commission in the army, these are advancements *pro tanto*. *Norton* v. *Norton*, *Mich.* 1692, by the Lords Commissioners, *Rawlinson* and *Hutchins*.

(z) See *Loyd* v. *Mansell*, ante, 2 vol. 74.

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brother with 30,000*l.*, or that she knew what her right was: that she was not apprised that, by reason of her mother's being compounded with, the children's share, instead of a third, was a moiety; or that her brother the defendant, being fully advanced by his father in his lifetime, this was a bar to him of his orphanage part; and though at law it was said *ignorantia juris non excusat*, yet if any one should take advantage of another's mistake in the law, even without any fraudulent suggestion or practice made use of by him, it would be against conscience so to do. And they put this case: Suppose *A.* should devise lands to *B.* and his heirs, and *B.* should die in the life of the testator, and then the testator dies, after which the testator's heir, not knowing that by law the devise to *B.* is void, (by *B.*'s dying in the life of the testator) should for a trifle release his right to a valuable estate, to the heir at law of such devisee; surely such release would not stand good. [P] And as it was out of the father's power by devise or otherwise, to debar any of his children of that share which they are entitled to by virtue of the custom [Q]; so here it was somewhat hard in the father to induce his daughter by any words in his will to give away and release what she had an undoubted right to; and admitting there was no direct fraud or misrepresentation, here was, however, (*a*) *suppressio veri*, though not *suggestio falsi*; could not be imagined the daughter intended to present her

If a man devises lands in fee to B. who dies in the life of the testator, and the testator's heir taking it that the heir of B. is entitled, for a trifling consideration conveys and confirms the estate to him; equity will relieve.

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(*a*) See Broderick *v.* Broderick, 1 vol. 239.

[P] See the case of *Broderick* v. *Broderick*, vol. i. 239., where a devisee under a will defectively executed represented the will as duly executed, and for a small sum gained a release from the heir; the court set aside the release.

[Q] It has been much questioned, whether a freeman's will can any way operate on the orphanage part. Formerly it seems to have been held, that a freeman had a power to appoint by will, that if any of his children should die within age, then such child's part should go to the surviving child or children. 1 Lev. 227. *Hammond* v. *Jones*, ruled by *Kelynge*, Chief Justice, at *nisi prius*, and said by *Wylde*, recorder of *London*, to have been so adjudged in Chancery. But latterly it has been admitted to be otherwise. See the case of *Jesson* v. *Essington*, Precedents in Chancery, 207. In the case of *Biddle* v. *Biddle*, heard before the Lord *Parker*, *Hil.* 1718, a freeman having a wife and one child, *inter al'* devised the orphanage part to the child, and in case of the child's death before twenty-one, then to go over to the testator's father; and it was held that this devise over was void, for that the father had nothing to do with the child's orphanage part, which came to him by the custom, not from the father; and were such devise over to be good, it would be a prejudice to the child, who (in case there were but one child) might devise over such part at fourteen, which would take effect were the child to die before twenty-one; or if he should die intestate and unmarried, it would go all to the mother as his next of kin, and not according to the father's will; or if the child should marry, and die within age, leaving issue, the widow and issue would be destitute, were such will to be good.

and in this case, since it would not be pretended that the daughter could have meant to give away 30,000*l.* to her brother, though he had asked for it, therefore this release ought not to be made use of in a court of equity to bar the daughter of that right which she did not know she herself had, and much less intended to give away.

On the other side, it was said to deserve consideration, that the father did by his will give this legacy of 10,000*l.* to his daughter, upon condition that she should release all her right by the custom; and though it could not be said here was a positive injunction on the daughter to do so, yet in all probability it was intended as a recommendation by the father, who might think 10,000*l.* a reasonable and honourable provision for the daughter, as she herself declared she thought it was, when she gave this release; and the father might be desirous that his son, who was to support his name, should have the rest of his estate: that the daughter might reasonably have a great regard for the intentions of her deceased father, (for which she was highly to be commended,) and might thereby be induced to comply with such intention, at the same time that she knew in strict justice there [320] was more due to her by virtue of the custom.

That however it was plain the brother had acted in this case without the least appearance of fraud, when he told her, before she executed the release, that she might if she pleased call him to account for the whole personal estate of her father, and have her orphanage part thereof: that this being the solemn act and deed of the party, executed by her freely and without any sort of compulsion or misrepresentation, and in compliance with her own father's will: and since, if the daughter was not informed of the custom of *London*, it was her own fault, and not her brother's; for these reasons it was said the deed of release ought not to be set aside.

Lord Chancellor.—I do not see that any manner of fraud has been made use of in this case, but still it seems hard, a young woman should suffer for her ignorance of the law, or of the custom of the city of *London;* or that the other side should take advantage of such ignorance. I remember well, that in this very case where the wife has been compounded with as to her customary part, not only the counsel have differed, but the court themselves have varied, in their determinations. It has, for instance, been held and determined by the court, that if the husband, a freeman of *Lon-*

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Freeman of London compounds with his wife for her customary part before marriage; it shall be taken as if no wife; and the husband shall have one half of the personal estate in his own power, the children the other half.

don,' has compounded with the wife before the marriage as to her customary part, this being the husband's own purchase, he ought to have as well his wife's customary part as his own: but now a different resolution seems to have prevailed, *viz.* that where the wife is compounded with before marriage, *it should be taken as if there was no wife, and consequently the testator shall have one half, and the children the other.(*a*) And if the court themselves have not, till very lately, agreed in what shares or proportions these customary parts shall go, the daughter, surely, might be well ignorant of her right, and ought not to suffer, or give others any advantage, by such her ignorance. Neither can it be inferred with sufficient certainty what the father recommends in this case: he rather seems to leave it to his daughter's option, either to claim her customary part, or release her right thereto and accept the legacy.

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(*a*) Vide Blunden *v.* Barker, 1 vol. 634.

It is true, it appears, the son the defendant did inform the daughter, that she was bound, either to waive the legacy given by the father, or to release her right by the custom; and so far she might know, that it was in her power to accept either the legacy, or orphanage part: but I hardly think she knew she was entitled to have an account taken of the personal estate of her father, and first to know what her orphanage part did amount to; and that, when she should be fully apprised of this,(*x*) then, and not till then, she was to make her election, which very much alters the case; for probably she would not have elected to accept her legacy, had she known, or been informed, what her orphanage part amounted unto, before she waived it, and accepted the legacy.

In what manner a party releasing ought to be informed of his right, so as to be bound bysuchrelease.

It would give light into this cause, to know what might be the value of the father's personal estate at his death, and (if the parties think fit) what was the value thereof, when the will was made; because it has been said to have been increased by the father between the time of making his will and his death; and also to know, what the son has received in his father's life-time from his father for or towards his advancement.

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(*x*) A party is always entitled to a clear knowledge of the funds between which he is to elect, before he is put to his election. *Hender* v. *Rose*, ante, 124 n. (A). *Butricke* v. *Broadhurst*, 1 Ves. Jun. 172. *Wake* v. *Wake*, 1 Ves. Jun. 336. S. C. 3 Bro. C. C. 255. *Whistler* v. *Webster*, 2 Ves. Jun. 371. *Kidney* v. *Coussmaker*, 12 Ves. 152. *Chalmers* v. *Storil*, 2 V. & B. 225. *Salkeld* v. *Vernon*, 1 Eden, 64. *Dillon* v. *Parker*, 1 Swan. 359, and n. (*a*) 381. *Stratford* v. *Powell*, 1 Ba. & Be. 23.

Therefore let the plea stand for an answer, saving the benefit thereof until the hearing; and let the defendant the son, answer, not as to particulars, (for that I do not expect) but by way of computation in gross, as to these points. [R]

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[R] It appears from the Register's book, that on the 8th of *May*, 1735, upon the defendant's motion it was alleged, that the suit was agreed between the parties; it was therefore prayed, that the plaintiff's bill might be dismissed without costs; which, on consent of the plaintiff's counsel, was ordered accordingly.

15. Jur. 341.
2 Eq. Abr. 700.
1905. 1. Ch. 550.
1. Eq. Ca. Abr. 501.

HASLEWOOD *v.* POPE.

Case 83.

IN this cause the following points were decreed by the Lord Chancellor:—

Lord Chancellor TALBOT.

First, If one devises all his lands, tenements, and hereditaments in *Dale*, and the testator is seised in fee of a manor in *Dale*, such manor, being an hereditament in *Dale*, would pass by this will; though perhaps it might be a doubt, if a man has lands, and also a manor in *Dale*, of which the lands are not parcel, whether by the devise of all his lands in *Dale*, his manor will pass.

2 Eq. Ca. Ab. 234. pl. 20. 259. pl. 15. 463. pl. 23, &c. If I devise all my lands and hereditaments in Dale, and have a manor in Dale; the manor, as it is an hereditament in Dale, will pass: but if I have the manor in Dale and also land there, not parcel of the manor, it is a question, whether the manor will pass by devise of all my lands.

Secondly, If a man devises all his lands, tenements, and hereditaments in *Dale*, in trust to pay his debts and legacies, and the testator has some freehold and * some copyhold lands, there, only the freehold lands shall pass; for his will must be intended of such lands and tenements as are devisable in their nature. *Secus*, if the testator had surrendered his copyhold lands to the use of his will, because this shews he did intend to devise his copyhold.(1) But even in the first case, if the freehold were not sufficient to pay his debts, when the testator devises all his lands in trust to pay his debts, it seems, rather than the debts should go unpaid, that the copyhold shall in equity pass.(2)

If I have freehold and copyhold lands in Dale, and devise all my land and hereditaments in Dale to pay my debts; only my freehold shall pass, if that be sufficient; secus, if I have surrendered the copyhold to the use of my will.

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Thirdly, If a man devises his lands to trustees to pay all

One devises all his real estate in trust to pay all his debts; the bond creditors recover part of their debts out of the personal estate; the simple contract debts shall be equally paid out of the real estate with the bond debts, and the bond creditors shall have nothing thereout, until the simple contract creditors shall have received as much from the same, as shall make them equal in payment with the bond creditors.

(1) *Goodwyn* v. *Goodwyn*, 1 Ves. 226. (2) Vide *Harris* v. *Ingledew*, ante, 96.

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his debts, and dies indebted by specialty and simple contract, and the bond creditors recover part of their debts out of the personal estate, and afterwards they apply to be paid the rest of their bond debts out of the real estate devised for that purpose; in this case, as the testator intended all his creditors should be equally paid their debts, the bond creditors shall not come in upon the land, until the simple contract creditors have received so much thereout, as to make them equal, and upon the level with the bond creditors, in respect of what they received out of the personal estate. And this the Lord Chancellor said was what the Master of the Rolls had very rightly (*a*) decreed on great consideration.(1)

(*a*) Deg *v.* Deg, 2 vol. 416.

On a devise of lands to pay debts, a legatee, whether specific or pecuniary, shall be paid out of the lands, if the simple contract creditors exhaust the personal estate.

Fourthly, Where one gives a specific, or even a pecuniary legacy, and devises lands to pay his debts; * if a simple contract creditor comes upon the personal estate, and exhausts it so far, as to break in upon the specific or pecuniary legacy, these legatees shall stand in the place of the creditors to receive their satisfaction out of the fund raised by the testator for the payment of their debts. (2) But,

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If one owes debts by bond, and devises his lands to J. S. in fee, and leaves a specific legacy and dies, and the bond creditor comes upon the specific legacy for payment of his debt; the specific legatee shall not stand in the place of the bond creditor, to charge the land, and why. (*b*) Clifton *v.* Burt, vol. 1. 678.

Fifthly, Where a man dies indebted by bond, and leaves a personal estate, and devises lands to *J. S.* in fee, and gives specific legacies, and the creditor by bond comes on the personal estate to be paid his bond; the specific legatees shall not stand in the place of the bond creditor, to charge the land devised, because the devisee of the land (*b*) is as much a specific devisee as the legatee of a specific legacy.

One devises all his personal estate to his daughter, and all his real estate to trustees in trust to pay debts, &c. remainder to his daughter in tail, remainder over: the personal estate shall in the first place be all applied to pay the debts.

Lastly, (and which was the principal point) One bequeathed all his personal estate to his daughter, then an infant of about seventeen, making her executrix, and devised all his lands, tenements, and hereditaments in *Dale*, to trustees, in trust to pay his debts and legacies, and gave the surplus of his lands, after payment of his debts, to his daughter in tail, remainder over.(3)

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(1) Vide *Car* v. *Countess of Burlington*, ante, 1 vol. 228.

(2) Vide *Clifton* v. *Burt*, ante, 1 vol. 678.

(3) The testator devised all his lands, &c. in the counties of *W.* and *M.* to trustees and their heirs, "upon trust "that they out of the rents and profits "or by lease mortgage or sale thereof, "or such part thereof as they should "think fit, should *raise so much money* "*as would discharge all the debts he* "*should owe at his death, and interest* "*for the same*, and apply the same in

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Hereupon it was insisted, that the daughter should have the personal estate exempt from the debts, and that the land which the testator devised to pay his debts should be first applied to that purpose; for which was cited *The Abridgment of Cases in Equity*, 271, *Adams* v. *Meyrick*, a strong case; and likewise a case decreed at the Rolls, 20th *Nov.* 1722, *Bradnox* v. *Gratwick*, where a man charged his lands with the payment of his debts, and gave some specific legacies, together with the rest of his personal estate, to his brother; in which case, forasmuch as the specific legacies would be exempt from the debts, as betwixt the devisee of the land and the specific legatee; so the court declared, they could not sever the specific legacies from the rest of the personal estate; and since the testator equally intended, that the residuary legatee should have the rest of his personal estate, as the specific legacies, therefore all the personal estate was held to be exempt from the debts.

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Lord Chancellor. The personal estate is the (*a*) natural fund for payment of debts, and which as against creditors, unless they please, the testator cannot exempt; but against the devisee of his land he may, by appropriating his land as a fund for payment of his debts; but even in that case, according to the general rule, there ought to be express words to exempt the personal estate from the debts, or at least words very plainly (2) shewing this to have been the inten-

Expresswords, or words tantamount, are requisite to exempt the personal estate from payment of debts.

(*a*) See Knight *v.* Knight, post. 333.

"such precedency as they should think "fit, and after payment of his debts, "that they should stand seised of such "part of the said premises as should "remain unsold to and for such person "and persons as should be entitled to "his other settled estates, and if any "money remained after payment of the "debts, the same should be paid to his "daughter, or such other person as "should be entitled to his said other "estates; and he gave *all his personal "estate* to his said daughter, and made "her sole executrix." Reg. Lib.

(2) So *French* v. *Chichester*, 1 Bro. P. C. 192. *Fereyes* v. *Robertson*, Bunb. 302. *Earl of Inchiquin* v. *Lord O'Bryen*,(*w*) 1 Wils. 82. and Amb. 33. S. C. *Samwell* v. *Wake*, 1 Bro. C. C. 144. *Duke of Ancaster* v. *Mayer*, 1 Bro. C. C. 454.(*x*) But in *Bampfield* v. *Wyndham*, Pre. Cha. 101. *Wainewright* v. *Bendlowes*, 2 Vern. 718. & Amb. 581. S. C. *Stapleton* v. *Colville*, Ca. temp. Talb. 202. *Whaley* v. *Cox*, 2 Eq. Ca. Ab. 549. *Walker* v. *Jack*,

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(*w*) S. C. by name of *Earl of Inchiquin* v. *French*, 1 Cox 1.

(*x*) So *Gray* v. *Minnethorpe*, 3 Ves. 103. *Brummell* v. *Protheroe*, 3 Ves. 111. *Tait* v. *Lord Northwick*, 4 Ves. 816. *Hartley* v. *Hurle*, 5 Ves. 540. *Brydges* v. *Phillips*, 6 Ves. 567. *Watson* v. *Brickwood*, 9 Ves. 447. *Tower* v. *Lord Rous*, 18 Ves. 132. *Aldridge* v. *Lord Wallscourt*, 1 Ba. & Be. 312. *Dolman* v. *Weston*, 1 Dick. 26. *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 538.

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tion of the testator. Here the testator gives his personal estate to his executors, which is no more than the law does, and is like giving the real estate to the heir, which is void.

But what I chiefly ground my opinion upon is, that here the same person is devisee of the personal, and also devisee of the surplus of the real estate in tail; and I cannot think it was the intention of the testator to exempt his personal estate from his debts, for no other reason, but that his daughter might dispose thereof by her will under her age of twenty-one, on purpose to leave the real estate of the testator, and which was settled on herself in tail, the more encumbered.(1)

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son, 2 Atk. 624. *Anderton* v. *Cooke and Kynaston* v. *Kynaston*, (cited) 1 Bro. C. C. 456, 457. *Holiday* v. *Bowman*, (cited) 1 Bro. C. C. 145. *Webb* v. *Jones*,(*y*) 2 Bro. C. C. 60, the intention of the testator appeared sufficiently clear to the court, to *exempt* the personal estate.(*z*)

(1) Reg. Lib. A. 1733. fol. 610.

(*y*) S. C. 1 Cox 245.

(*z*) *Burton* v. *Knowlton*, 3 Ves. 107. *Hancox* v. *Abbey*, 11 Ves. 179. *Bootle* v. *Blundell*, 1 Mer. 193. *Gittins* v. *Steele*, 1 Swan. 24. *Greene* v. *Greene*, 4 Mad. 148.

Case 84.

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Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 81. pl. 9. If a demurrer be to part of the plaintiff's bill, and an insufficient answer to the residue; yet the plaintiff cannot except, until the demurrer is argued.

LONDON ASSURANCE *v.* EAST-INDIA COMPANY.

THE Solicitor-General moved to discharge a demurrer to part of the plaintiff's bill, endeavouring to shew it was a frivolous demurrer; and that, though it was but to a small part only of the bill, and notwithstanding the answer to the rest of the bill was most apparently insufficient; yet this demurrer, until argued, would stop the plaintiffs from putting in any exceptions to the defendants' insufficient answer; that no more was desired, than to have leave to put in exceptions to the answer to the other part of the bill, otherwise the plaintiffs might be delayed from getting an answer till the demurrer should be argued.

Lord Chancellor. Were this *res integra*, I can see no reason why, where the defendant demurs to part only of the plaintiff's bill, this should stay the plaintiff's putting in exceptions to the defendant's answer, as being insufficient, to

another distinct part of the same bill. Indeed, if there was any colour to doubt how far the demurrer extends, it might be reasonable, that the Master should not take upon himself to determine the question, or to proceed upon the exceptions to the answer. However, seeing the course of the court is otherwise, (*y*) I will not alter it; especially in this case, where it appears, the plaintiff has delayed himself by obtaining four several orders to amend his own bill; and it not being pretended that there is any irregularity in putting in the demurrer; if there be the least doubt touching the validity of the demurrer, the plaintiff ought to set it down to be argued, and not come to have it discharged upon a motion, or to go into the merits. [S]

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[S] But if to a bill the defendant answers as to matter of discovery, and pleads only as to relief, the plaintiff may except to any matter of discovery before the plea argued; for that plainly no matter of discovery is covered by the plea. So ruled by the Master of the Rolls on a motion to discharge the exceptions; and Mr. *Vernon*, who was for the motion, did afterwards admit the course of the court to be so, 14th of *December*, 1719. Note also, the Lord *Parker* some time before ruled in the same manner. (*z*)

(*y*) A plaintiff may except before a plea or demurrer is argued: but by so doing, he admits its validity. Mitf. 3d Ed. 256.: confirmed by *Eldon*, Lord Chancellor, in *Boyd* v. *Mills*, 13 Ves. 85.

(*z*) So *Pigot* v. *Stace*, 2 Dick. 496. *Sidney* v. *Perry*, 2 Dick. 602. See however *Baker* v. *Pritchard*, 2 Atk. 390.; and *Darnell* v. *Reyny*, 1 Vern. 344.

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Case 85.

TERM. S. MICHAELIS, 1734.

Lord Chancellor TALBOT.

26. Ch. D. 787.

Charlton et al', Creditors of Samuel Low, deceased, } Plaintiffs.

Susannah Low, Sister and Administratrix of the said Samuel Low, and others, being a Mortgagee, and a Judgment Creditor of the said Samuel Low, } Defendants.

2 Eq. Ca. Ab. 258. pl. 14. 463. pl. 20. 470. pl. 6. One possessed of a term for 1000 years, articles to purchase the inheritance, and by will gives 3000*l.* to his daughter, and makes his son executor, and dies; the son assigns the term in trust to attend the inheritance, of which he takes a conveyance in his own name. Afterwards the son acknowledges a judgment to A., and mortgages the same lands to B., and dies insolvent; A. shall first be paid his judgment, then B. shall be paid his mortgage, and then the daughter (being administratrix to her brother) is entitled to her legacy of 3000*l.* in preference to the simple contract creditors.

HENRY Low, the father of *Samuel*, purchased a term of 1000 years in the lands in question, and agreed to give a full consideration for the inheritance; whereupon the vendor covenanted to procure a conveyance to be made thereof to the vendee and his heirs.

[329] *Henry Low*, the father, died before the conveyance made, having by his will given to his daughter, the defendant *Susannah*, a legacy of 3000*l.*, and left *Samuel*, his eldest son, executor. *Samuel*, the executor and heir, assigned the term in trust to attend the inheritance intended to be by him purchased, and afterwards took a conveyance of the inheritance to himself. Subsequent to this, *Samuel* confessed a judgment to one of the defendants, and made a mortgage of the inheritance to another of the defendants, without taking any notice, or making any assignment of the old term of 1000 years, and died insolvent.

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The question was, whether *Susannah*, the legatee of the 3000*l.*, and who was the administratrix of *Samuel Low* her brother, was entitled to a satisfaction for her 3000*l.* out of this term of 1000 years, in preference to the other incumbrancers; and to have it considered as equitable assets of *Low* the father, notwithstanding the assignment made by the son in trust to attend the inheritance. Or, whether the judgment creditor and mortgagee should have the benefit of this term, as connected with the inheritance by the assignment that had been made thereof, to attend the same?

It was insisted for *Susannah* the legatee, that the assignment by the son, though it passed the legal interest, so as to prevent its remaining assets at law, yet it did not take away the right of the legatee, who had a prior demand thereon, and was at liberty to follow those assets in equity, unless aliened for a valuable consideration, and without notice; that if *Samuel* had purchased the inheritance without having assigned the term, such term would not have been merged, because he would have had it in (*a*) *autre droit;* and this assignment being only in trust for himself, should have the same consideration as if it had continued in the father.

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Lord Chancellor. It is observable, that the testator *Henry Low* the father had in effect purchased the inheritance, (*z*) and the son obtained a conveyance of the inheritance, in conformity only to the father's intentions. The term, by this assignment made of it by *Samuel* the son, is become not assets at law; for which reason the legatee cannot pursue it specifically, but must have her satisfaction, as for a *devastavit*, out of the executor's assets; for, as this case stands, the legal interest of the term being in trust for the mortgagor at the time when the mortgage of the inheritance was made, it was so far a fraud upon the mortgagee, as it was concealed from him; and the trustees of this term of 1000 years, which was assigned to attend this inheritance, became trustees for the mortgagee of the inheritance. Nay a term assigned in

A term assigned by an executor in trust to attend the inheritance, shall in equity follow all the estates created out of it, and all incumbrances subsisting upon it. But the term being by this means become not assets at law, the executor who assigned the same is liable to the creditors for a devastavit.

(*a*) Supposing it to merge, it would occasion a *devastavit.* 8 *Co.* 136. 1 *Inst.* 264. *b.* 338. *b.*

(*z*) By this the term in which he had the legal estate became attendant upon the inheritance in which he had an equitable estate. *Capel* v. *Girdler*, 9 Ves. 509.

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trust to attend the inheritance will, in equity, follow all (1) the estates created thereout, and all the incumbrances subsisting upon such inheritance; and is so connected with it, that equity will not suffer it to be severed to the detriment of a *bona fide purchaser*, who shall have the benefit of all interests which the mortgagor had at the time the mortgage was made, unless against an intermediate purchaser without notice.

Therefore the judgment-creditor of the mortgagor must be first satisfied, according to the priority of liens affecting the real estate; in the next place the mortgagee. And as the
[331] estate is to be sold for the satisfaction of creditors, though the sister, who is administratrix of her brother *Samuel*, claims a debt but by simple contract, on account of the *devastavit;* yet having a right, as administratrix, to retain against all creditors in equal degree, she shall consequently retain her debt *prior* to all the simple contract creditors of her brother. (2)

(1) *Willoughby* v. *Willoughby*, 1 T. R. 763.(*y*)
(2) Reg. Lib. A. 1734. fol. 292.

(*y*) *S. C.* Amb. 282. *Maundrell* v. *Maundrell*, 7 Ves. 577. 269. *Ex parte Knott*, 11 Ves. 618. 10 Ves. 259, *Shine* v. *Gough*, 1 Ba. and Be. 445.

10. Sim., 571.

Case 86.

Ann Knight, Widow of Jacob Knight, deceased, } Plaintiff.

Lord Chancellor TALBOT.

John Knight, Esq. eldest Son of said Jacob Knight, and others, } Defendants.

2 Eq. Ca. Ab. 169. pl. 25. A. covenants for himself and his heirs, that a jointure house shall remain to the uses in the settlement. The jointress brings a bill against the heir for a performance. The defendant demurs, for that the executor ought to be a party; resolved, that though at law the creditor may sue the heir only, where the heir is expressly bound; yet as the personal estate is the natural fund to pay all debts, and as the executor may make it appear that he has performed the covenant, the executor must be made a party in equity.

THE bill was brought by the plaintiff, the widow of the said *Jacob Knight*, against the defendant *John Knight*, as eldest son and heir of the said *Jacob Knight*, in order to compel him to rebuild and finish the plaintiff's jointure-house, and to make satisfaction for the damage which she had sustained

for want of the use thereof; and set forth, that upon the marriage of the plaintiff, by a settlement bearing date the 10th of *February* 1710, *Jacob Knight*, the defendant's father, settled the capital messuage in ——— together with lands of 400*l. per annum*, in the county of *Gloucester*, to the use of himself for life without waste, remainder to the use of his wife for life, remainder to the use of the first, &c. son of the marriage in tail male successively, with remainders over: that by the said settlement the defendant's father *Jacob Knight* covenanted for himself and [332] his heirs, with his said wife's trustees, that the capital messuage and premisses should remain to the uses in the settlement, without any act done, or to be done, by the said *Jacob Knight* to the contrary: that the said *Jacob Knight*, the defendant's father, did some time afterwards pull down great part of the said capital messuage; and that he had issue by the plaintiff the defendant his eldest son; and that he afterwards died, leaving real assets of great value to descend to his son the defendant: and that the plaintiff after her husband's death, the said capital messuage not being inhabitable, was forced to hire another house for her habitation, and therefore brought this bill to compel the defendant to rebuild or repair the said capital messuage; and likewise that she (the plaintiff) might be recompensed in damages for what she had suffered by being forced to hire another house in lieu of her jointure-house.

As to such part of the bill as prayed that he should rebuild or repair so much of the said capital messuage as his father had pulled down as aforesaid; or which sought to be repaired in damages for want of the use thereof; and in respect of the plaintiff's being forced to hire another house in its stead: the defendant demurred, and for cause shewed, that there was no executor or administrator of the plaintiff's late husband brought before the court by the bill, or made a party thereto.

Upon the demurrer's coming on to be argued before the Lord Chancellor, it was objected, that at law, in the case of any demand where the heir is expressly bound, the creditor has an election to sue the heir alone, or the executors or administrators of the debtor; and if it be so at law, the same rule might well be allowed to prevail in this court, which [333] ought not to put the creditors upon the difficulty of hunting

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after personal assets, not recoverable, in all probability, without charge and expense of time; and therefore, as the heir was liable alone to answer this debt at law, so he ought to be in equity, and might reimburse himself as well as he could, by suing the executors or administrators of the debtor in order thereto.

Sed Curia contra. It is true that at law the creditors may sue the heir only, where he is expressly bound, but equity is otherwise; on the contrary, in equity, the creditors may sue both the heir and the executor, which they cannot do at law; so that the rules of law and equity are different. The natural fund for the payment of debts is the personal estate, and this ought to go in ease of the land. It does not appear in the principal case, but that the executor or administrator [A] may have made satisfaction to the plaintiff for the breach of this covenant, which the executor, &c. might have disclosed to the court, had he been party to the bill.

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The court of equity delights to do complete justice and not by halves: as to make a decree against the heir, and to leave another suit for him against the executor.

Now the court of equity in all cases delights to do complete justice, and not by halves: as, first, to decree the heir to perform this covenant, and then to put the heir upon ano-

[A] In a bill brought by a mortgagee against the heir of a mortgagor to foreclose, it was objected, that the executor of the mortgagor ought to be a party, because it did not appear but that he might have paid the debt. But by the Master of the Rolls, (in the absence of the Lord Chancellor,) and *Goldsborough* the Register, there is no necessity (1) for making the executor of the mortgagor a party; because the bill being only to foreclose the equity, the plaintiff need only make him a party that has the equity, *(viz.)* the heir, and the course is so. Neither is the plaintiff the mortgagee any ways bound to intermeddle with the personal estate, or to run into an account thereof; and if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it. *Duncombe* v. *Hansley*, *Paschæ*, 1720. So note the diversity between the case above reported of *Knight* v. *Knight*, and this last; for there the bill was to recover satisfaction in damages for want of repairs, &c. and the personal estate is the natural fund for that purpose: but here the bill was not to recover the debt, but only to bar the equity of redemption.

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(1) *Fell* v. *Browne*, 2 Bro. C. C. 279. (z)

(z) So though the mortgage is only for a term of years. *Bradshaw* v. *Outram*, 13 Ves. 234. But if the bill be for a sale, the personal representative of the mortgagor must be a party. *Daniel* v. *Skipwith*, 2 Bro. C. C. 155. *M'Donough* v. *Shewbridge*, 2 Ba. and Be. 563. *Christophers* v. *Sparke*, 2 J. and W. 229.

ther bill against the executor to reimburse himself out of the personal assets, which for aught appears to the contrary, may be more than sufficient to answer the covenant; and where the executor and heir are both brought before the court, complete justice may be done, by decreeing the executor to perform this covenant as far as the personal assets will extend; the rest to be made good by the heir out of the real assets. And here appears no difficulty or inconvenience in bringing the executor before the court. On the contrary it would prevent a multiplicity of suits, which a court of equity (*a*) ought to do, wherefore allow the demurrer. (1)

(*a*) Ante 157.

(1) *Plunket* v. *Penson*, 2 Atk. 51. (*y*)

(*y*) And see *Humphreys* v. *Humphreys*, post, 349.

Case 87.

SLANNING ET AL' *v.* STYLE; ET E CONTRA.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 65. pl. 10. 156. pl. 4. 326. pl. 37. 454. pl. 12. One by will gives all his household goods and implements of household. The malt, hops, beer, ale, and other victuals in the house, do not pass: but the clock, if not fixed to the house, shall pass; but not the guns or pistols, if used as arms in riding, or shooting game. (*z*)

ROBERT STYLE had a wife by whom he had no issue; and had three sisters, (*viz.*) the plaintiff *Elizabeth*, wife of the plaintiff *Slanning*, the plaintiff *Ann*, wife of the plaintiff *Pelling*, and the plaintiff *Hannah Style*, spinster. This *Robert Style* made his will in *March* 1732; and being seised in fee of some real estate, particularly a farm of 200*l. per annum*, (which he kept in his own hands) and possessed of a very plentiful personal estate, devised to his wife 30*l. per annum* for her life, charged on his real estate, and devised also to his wife an annuity of 40*l. per annum* for the life of her mother, charged upon the residue of his personal estate, payable quarterly. The testator bequeathed to his wife his silver coffee-pot, and silver tea-pot, with divers other specific *pieces of plate, to hold to her for life, and after her decease the same to go to his god-son *Robert Style*. He also by his will gave the defendant his wife his tea-table, tea-kettle, and all his pewter, brass, linen, and woollen, with all his household goods and implements of household whatsoever in or about his

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(*z*) See *Pratt* v. *Jackson*, ante, 2 vol. 302.

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dwelling-house, to be at her disposal. All his stock of corn, and the residue of his personal estate, he gave to his said three sisters, equally to be divided betwixt them, and made them executors.

The three sisters and their husbands brought their bill against the widow for divers goods of the testator detained by her, which were not given her by the said will; and the widow preferred her bill for goods detained by the executors, and which (as was alleged) she was entitled to by the will.

And, first, the defendant the widow claimed the malt and hops in the house, likewise all the beer and ale therein, together with the guns, pistols, and the clock; insisting that these were intended by the bequest of the household goods and implements of household, that they were goods in the house, and necessary for the maintenance of the family.

Lord Chancellor. These things which are victuals, and whose use is in their consumption, cannot in their common natural sense be taken to be household goods, and pass under that denomination; therefore, they do not belong to the widow, but ought to be delivered over by her to the executors the residuary legatees; neither will the guns and pistols that were in the house, if used in riding or shooting of game, pass to the widow by the words *household goods;* though these may in some sense be said to be for the de-

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fence of the house; but the clock in the house, if not fixed thereto, shall be included within these words *household goods*. Moreover the widow, as to the things the use whereof is given her for life, must sign an inventory expressing these things to be in her custody, as given to her for life only, and that afterwards they are to be delivered, and remain to the use and benefit of the godson *Robert Style*.

Where the use of goods is given to one for life, the cestuy que use for life must sign an inventory, expressing that he is entitled to these things for his life, and that afterwards they belong to the person in remainder. See vol. I. case 1.

The next question was, touching the annuity of 40*l. per annum*, given by this will to the widow for her mother's life, charged upon the residue of the personal estate; and here, forasmuch as the personal estate was liable to be in a short time wasted, (possibly by the husbands of the wives to whom the testator gave the residue) and the widow by that means to be deprived of the benefit of this annuity, which the testator intended should be duly secured, and paid to her quarterly for her maintenance in all events; therefore it was

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insisted, that the husbands of the wives should give some security for the payment of the same.

Against which it was said, that there was no reason the executors, whom the testator thought fit to intrust without putting terms on them, should be compelled to give any security to the widow; but that, as he had freely intrusted them, she should do so too, especially in this case, where it did not appear, that they or their husbands had committed any manner of embezzlement or conversion of the goods.

Lord Chancellor. Generally speaking, where the testator thinks fit to repose a trust, in such case, until * some breach of that trust be shewn, or at least a tendency [B] thereto, the court will continue to intrust the same hand, without calling for any other security, than what the testator has required (*y*): but here the testator himself has charged the residue of his personal estate with this annuity, which he plainly intended should be duly and quarterly paid; and as this estate appears to consist of some bonds or securities, let such part thereof be brought before the Master, as may be sufficient to preserve this annuity of 40*l. per annum* for the widow.

Where the will does not require, that the executor shall give security, it is not usual for the court to insist on it, until some misbehaviour; but where one by will charges the residue of his personal estate with 40*l.* per annum to his wife, to be paid quarterly, the executor was ordered to bring before the Master sufficient in bonds and securities to be set apart to secure this annuity.

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Another thing insisted upon on behalf of the defendant the widow was, that the testator allowed his first wife to dis-

An husband voluntarily, and after marriage, allows the wife for her separate use, to make profit of all butter, eggs, pigs, poultry, and fruit, beyond what is used in the family; out of which the wife saves 100*l.* which the husband borrows, and dies; the court will allow this agreement, to encourage the wife's frugality; and the wife shall come in a creditor for this 100*l.*, especially there being no defect of assets to pay debts.

[B] See vol. 2. 163. *Batten* v. *Earnley*. And yet we find, that the spiritual court has sometimes refused to grant the probate of a will to an executor, who has been reputed a person of no substance, and absconded for debt, until he should give security for a due administration of the assets; under pretence, that the legacies, which were considerable, were in danger of being lost: and, that they might as well reject an executor, where he declines giving such security, as where he refuses to take the oath of due administration, which is the common practice. But the court of King's Bench has in such case enforced the granting of the probate by a peremptory mandamus. From the author's manuscript report of the case of *The King* v. *Raynes*. See also *Salk.* 299. S. C.

(*y*) *Taylor* v. *Allen*, 2 Atk. 213. *Anon.* 12 Ves. 4. *Middleton* v. *Dodswell*, 13 Ves. 266. *Howard* v. *Papera*, 1 Mad. 142. *Gladdon* v. *Stoneman*, ib. 143 n. *Scott* v. *Becher*, 4 Price 346. *Langley* v. *Hawke*, 5 Mad. 46.

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pose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from the said farm, (over and besides what was used in the family) for her own separate use, calling it her *pin-money;* and upon the death of the first wife, and until the testator married the defendant *Style*, the testator's sister the defendant *Pelling* kept his house, and had the same allowance, which was also continued to the defendant the widow, after her marriage, by way of *pin-money;* and it was proved in the cause, that her

[338] husband, whenever any person came to buy any fowls, pigs, &c. would say, he had nothing to do with those things, which were his wife's; and that he also confessed, that having been making a purchase of about 1000*l.* value, and wanting some money, he had been obliged to borrow 100*l.* of his wife to make up the purchase-money; therefore now the widow claimed to be paid this 100*l.*

To which it was answered, that here was no deed touching this agreement, nor any writing whatsoever, whereby to raise a separate property in a feme covert, which was what the law did not favour; that it was no more than a connivance or permission, that the wife should take these things, and continue to enjoy them during his (the husband's) pleasure, which pleasure was determined by his death; besides, this agreement being after marriage, was but a voluntary one, for which a court of equity usually leaves the party to take his remedy at law; and that, in truth, the husband's borrowing this 100*l.* of his wife, was no more than borrowing his own money.

But the Lord Chancellor decreed, that the widow, the defendant, was well entitled to come in for this 100*l.* as a creditor before the Master; observing, that the courts of equity have taken notice of and allowed feme coverts to have separate interests by their husband's agreement (*x*): and this 100*l.* being the wife's savings, and here being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail, were it to determine by the husband's death; that it was the strongest proof of the husband's consent, that the wife should have a separate property in

(*x*) *Walter* v. *Hodge*, 2 Swan. 105. and see *Harvey* v. *Harvey*, ante, 1 vol. 125. and *Bennet* v. *Davis*, ante, 2 vol. 318.

the money arising by these savings, in that he had applied to her, and prevailed with her to lend him this sum; in which case he did not lay claim to it as his own, but submitted to borrow it as her money.

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Wherefore, and especially as here was no creditor of the husband to contend with, it was ordered, that the wife should be allowed to come in for this 100*l.* as a creditor before the Master; and the court cited the case of *Calmady* v. *Calmady*, where there was the like agreement made betwixt the husband and wife, that upon every renewal of a lease by the husband, two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money.

So where the husband agreed, that the wife should take two guineas of every tenant that renewed a lease with the husband, beyond the fine which the husband received; this was allowed to be the wife's separate money.

3. Hare. 318.

The LADY COX's Case.

Case 88.

Sir JOSEPH JEKYLL, Master of the Rolls.

SIR CHARLES COX, a brewer in *Southwark*, having a wife that lived for some time separate from him, made his addresses to a young woman in order to marry her, who at length, against the approbation of her friends, consented to marry him. Accordingly they were married; but the young woman had no manner of notice that Sir *Charles Cox* had any former wife then living.

2 Eq. Ca. Ab. 182. pl. 6. 258. pl. 13. A. having a wife who lived separate from him, afterwards courted and married another woman, who knew nothing of the former wife's being alive: but it being discovered to the second wife, that the former was alive, A. in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee of the second wife, to leave her 1000*l.* at his death, and died, not leaving assets to pay his simple contract debts; if this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife, after such time as she knew the first wife was living, and to induce her to continue with A.; this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts.

Some time after the marriage, it was discovered, that Sir *Charles* had another wife then living, which gave great trouble and uneasiness to this second wife; but she having disobliged her friends by the marriage, and Sir *Charles* telling her, that his first wife was in years, very infirm, and not likely to live, and that in case he should survive such first wife, he would marry her: this lady was prevailed upon to continue to cohabit with Sir *Charles;* and about five or six years afterwards, Sir *Charles* gave a bond to a trustee of the second wife, to leave her 1000*l.* at his death; and Sir *Charles*

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Lady Cox's Case.

soon after dying, the plaintiff, the lady, brought her bill for this 1000*l.*; and there happening to be a deficiency of assets to pay the simple contract debts, the question now was, whether this 1000*l.* thus secured by bond should take place of the simple contract debts?

It was insisted for the plaintiff, that she was an innocent young lady, greatly injured by Sir *Charles Cox*, who pretending to be a single man, and having made his addresses as such, had drawn her in to marry him without the least notice or suspicion that he was a married man; that all the compassion imaginable was due to a lady thus betrayed, who might have maintained an action at law for this injury; in which case, supposing the 1000*l.* in question had been given by the jury for damages, it had been but just; and if so, it was surely no less just in the husband to give her a bond for the like sum.

The Master of the Rolls took time to consider of the case, and at length gave judgment, that this bond should be postponed to all the simple contract debts owing by Sir *Charles Cox*. His Honour admitted, that if the bond had been given upon the first discovery that Sir *Charles* was married to a former wife then living, and by way of recompence for that * injury, and thereupon Sir *Charles* and this gentlewoman had parted, this had been a just bond, and for a meritorious consideration; but that in the present case the bond was not given until five or six years after there had been a discovery of the former marriage, which made it reasonable to think it was given by Sir *Charles* to this lady, rather to induce her to continue to live with him, than upon any other motive; in which case the bond would be worse than a voluntary one; for then it would be given for a wicked consideration, that of her living in adultery with Sir *Charles;* and this unfortunate lady, whatever the consequence had been, ought to have left Sir *Charles*, after she had fully discovered he had a former wife living; that if such bond had been given to a lawful wife after marriage, this had been a voluntary bond, and (*a*) void against creditors; much more, when given to one who was no wife, and upon such an illicit consideration. (1)

If such bond had been given to the second wife as a recompence for the injury done her, and thereupon she had left A.; it had been a good bond, and to be paid before any simple contract debts.

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(*a*) Ante, 222.

(1) Reg. Lib. 1734. fol. 113, by the name of *North* v. *Cox*. Et vide *Marchioness of Annandale* v. *Harris*, ante, 2 vol. 432. *Walker* v. *Perkins*, 3 Burr. 1568. *Priest* v. *Parrot*, 2 Vez. 160.

THE CASE OF THE CREDITORS OF SIR CHARLES COX. (1)

Case 89.

Sir Joseph Jekyll, Master of the Rolls.

2 Eq. Ca. Ab. 462. pl. 19. 463. pl. 21, 22. 469. pl. 21, 22.

One possessed of a term for years, mortgages it, and dies, leaving debts, some by bond, and some by simple contract; the equity of redemption is equitable assets, and shall be liable to all the debts equally.

Another part of this case was reserved for the further consideration of the court, and was as follows:

Sir *Charles Cox* possessed of a term for years made a mortgage thereof, and died possessed of the equity of redemption of the said mortgage, and leaving greater debts due from him at his death than his estate would extend to pay. Whereupon the question was, whether this mere equity of redemption was * only equitable assets, and distributable equally *pro rata*, among all the creditors, without regard to the degree or quality of their debts; or whether it should be applied in a course of administration; in which last case the bond creditors would swallow up all the assets, without leaving any thing for the simple contract creditors.

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And his Honour, after time taken to consider of it, delivered his opinion with solemnity: that this equity of redemption was equitable assets only, the mortgage being forfeited at law, and the whole estate thereby vested in the mortgagee; and it being now become precarious and doubtful, whether it would prove worth redeeming; also, for that the *quantum* of the money due on the mortgage was uncertain, forasmuch as, when the executors of the mortgagor should be admitted to redeem, they must pay costs, which in equity are considerable; so that it cannot now be known what the surplus money on the redemption would amount to upon the account taken. Wherefore this right of redemption being barely an equitable interest, it was reasonable to construe it equitable assets, and consequently distributable amongst all the creditors *pro rata*, without having respect to the degree or quality of their debts; all debts being in a conscientious regard equal, and equality the highest equity; accordingly it was (*a*) so decreed. But,

(*a*) See 1 Vern. 293. Morgan *v.* Lord Sherrard.

(1) The title of the cause was, *Spencer* v. *Cox*, Reg. Lib. B. 1734. fol. 113. and was probably the same cause as *Spencer* v. *Biffin*, cited in 2 Atk. 291. as it appears by the Register's book, that *Biffin* was the maiden name of Sir *Charles's* second wife.

The Case of the Creditors of Sir C. Cox.

Secondly, The court declared, that where a bond is due to *A.*, but taken in the name of *B.* in trust for *A.*, and *A.* dies; this must be paid (1) in a course of administration; for in such case there can hardly be any dispute touching the *quantum* of the debt, seeing the * principal, interest, and also the costs, must be paid to the obligee in the bond; whereas in the other case, the costs must be paid by the party coming to redeem. For the same reason, if a term for years be taken in the name of *B.*, in trust for *A.*, this, on the death of *A.* the *cestuy que trust*, will be legal assets; for here the right to the thing is plain; and if the trustee contests it, he must, *prima facie*, do it on the peril of paying costs.

But where a bond is given to B. in trust for A. who dies; the money due on the bond shall be paid in a course of administration; so if there be a term for years to B. in trust for A.

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Thirdly, The court apprehended, that if a simple contract creditor, on behalf of himself and the rest of the creditors, were to bring a bill and obtain a decree, that he and the rest of the creditors should come in before the Master, and be paid all their debts; and that an advertisement be put in the *Gazette* for that purpose: here any bond creditor coming in on the foot of the decree should be paid only *pro rata* with the simple contract creditors; for his coming in implies a submission to the decree. And this was thought to be clear. But,

If a bill be brought by a simple contract creditor, on behalf of himself and the rest of the creditors of J. S. to be paid their debts, and there is a decree that the plaintiff and the rest of the creditors shall come before the Master and prove their debts; bond creditors coming in under the decree shall be paid no more than a proportion with the simple contract creditors.

Fourthly, The court inclined to hold further, that if such bond creditor would lie by, having notice of the decree, and advertisement in the *Gazette*, (notwithstanding every one is in many cases obliged to take notice of a *lis pendens)* and after such lying by, should bring his action at law against the executor or administrator of the obligor; though at law the latter may not be able to defend himself, yet his Honour thought that in this case an equity would arise in favour of such executor or administrator, and of the simple contract creditors, to compel the bond creditor to come in and accept of a proportion of his debt rateably with the simple contract creditors. (2) But however strongly his Honour inclined to be of this opinion, he said, it was no part of his judgment. Nevertheless he declared, he should always do his utmost to extend the rule of distributing equitable assets equally amongst all creditors. See 2 *Vern.* 435. *Shephard* v. *Kent.*

Also, if a bond creditor lies by until the executor has paid away all the assets under the decree, he shall, it seems, be bound to take pro rata with the simple contract creditors.

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(1) *Wilson* v. *Fielding*, 2 Vern. 763. *Morrice* v. *Bank of England*, Ca. temp. Tal. 217.

(2) As to the third and fourth points it has been since settled otherwise, vide

This resolution was communicated to me by the Master of the Rolls himself, *Jan.* 17, 1734.(1)

Case of the Creditors of Sir C. Cox.

(1) At the hearing of the causes of *North* v. *Cox*, and *Spencer* v. *Cox*, in *Mich.* 1734, it was ordered, (amongst other things) that in taking the accounts thereby directed, the Master should distinguish which were legal and which were equitable assets of Sir *Charles Cox;* and that such as were legal assets should be applied in a course of administration, and such as were equitable should be applied *pari passu* in paying the testator's debts not satisfied out of the legal assets, but such of the creditors as should receive any satisfaction out of the legal assets, were not to receive any thing towards satisfaction of the remainder of their debts out of the equitable assets, until all the other creditors of the said testator (except *Hinton*, and his wife, who was the second wife of Sir *Charles Cox*, as above-mentioned) should out of the equitable assets receive towards satisfaction of their respective debts so much as would make them up equal in proportion to their respective debts, with the creditors who had received out of the legal assets; and the consideration of costs was reserved. Reg. Lib. B. 1734. fol. 113. No farther order (except the confirmation of a separate report) appears to have been made in these causes until *Hil. Term*, 1740. when the Master's general report was confirmed. Reg. Lib. B. 1740. fol. 125, 134. Upon looking into the Master's report it appears, that the only two creditors being in equal degree, the Master declined to distinguish which were legal, and which were equitable assets. So that the point was not in fact determined. *Hartwell* v. *Chitters*, Amb. 308. rests wholly on the supposed authority of this case.(*x*) On the other hand it has been decided that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets *at law* in the hands of the executor, for so much as they are worth beyond the sum paid for their redemption, though recoverable only in *equity*. *Hawkins* v. *Lawes*, 1 Leo. 155. *Harcourt* v. *Wrenham*, or *Harwood* v. *Wrayman*, Moore 858. 1 Roll. Rep. 56. 1 Brownl. 76. 1 Roll. Ab. 920. *Alexander* v. *Lady Graham*, 1 Leo. 225.

(*x*) See also in *Sharpe* v. *Earl of Scarborough*, 4 Ves. 541. the Solicitor-General (*Mitford's*) remarks upon the principal case, and *Hartwell* v. *Chitters*. But in *Clay* v. *Willis*, 1 B. & C. 372. Bayley, J. cites those cases as authority; though as the equity of redemption in *Clay* v. *Willis* was of a freehold estate, the point as to leasehold estates did not come in question.

Case 90. LOYD ET UX' ET AL' *v.* SPILLET ET AL'.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 241. pl. 30. 776. pl. 25. A. devises all his real and personal estate to trustees, their heirs and executors, in trust to pay 15*l.* per annum to the plaintiffs his two sisters for their lives, and after several legacies, the surplus in trust for the dissenting ministers at Reading, &c.

JOHN STAMP, uncle of the two plaintiffs the feme coverts, seised in fee of a considerable real, and possessed of a great personal estate, made his will dated the 28th of *March*, 1721, and thereby devised all his real and personal estate to the defendant *Spillet*, and another trustee, (since dead) their heirs, executors, and administrators, in trust to pay 15*l.* *per annum* a-piece, to the plaintiffs his two sisters, (the wives of the other plaintiffs) for their lives, and after some pecuniary legacies thereby given, then in trust, as to the surplus, *for those persons that are commonly called Dissenting Ministers*, particularly 35*l.* *per annum*, to the dissenting minister at *Reading*, in *Berks*, the like annuity to the dissenting minister at *Wareham*, the like * to him at *Weymouth*, in *Dorsetshire*; and gave 300*l.* a-piece to the defendant the trustee, and the other trustee deceased, and 20*l.* *per annum* to each, while they took care in executing the trust.

and gives 300*l.* legacies to his trustees. Afterwards the testator by two deeds of a subsequent date conveys all his real estate, and makes a gift of his personal estate to the use of the same trustees and their heirs, &c. proviso both deeds to be void, on his tender of 10*s.* to them. There was also a proviso in the will, that if the sisters disputed the will, they should forfeit their annuities. Testator, after he had executed the deeds, still kept the same in his own custody. The trustees refuse paying the sisters their annuities, who thereupon bring their bill, insisting that the deed had revoked the will; and that there was a resulting trust for them as heirs at law; or at least that they (the sisters) were entitled to their 15*l.* per annum annuities. The defendant insisted on the plaintiffs having forfeited their annuities; decreed that the annuities should be paid to the two sisters the plaintiffs, but the surplus to go to the dissenting ministers.

[*345] Afterwards by a deed of a subsequent date to the will, the testator conveyed all his real estate unto and to the use of the said trustees and their heirs, with a proviso to be void, on tender of 10*s.* And by another deed of the same date he granted all his personal estate to the same trustees, to be void also on tender of the like sum of 10*s.* both which said deeds the testator kept in his own custody, and soon after died.

S. Cur. 117.

The trustees for some time paid the 15*l.* a-piece, to each of the testator's sisters; but afterwards refused to continue the payment thereof, and did likewise refuse to pay any of the dissenting ministers; but received the rents and profits of the premises to their own use.

The two sisters and their husbands brought this bill in equity against the surviving trustee, insisting that the deed

of conveyance of the real estate, and the deed of gift of the personal estate being subsequent to the will, did plainly revoke such will; and the conveyance and deed being voluntary, without any consideration, and the defendant being intended to be but a trustee, a resulting trust must arise for the plaintiffs the heirs at law; which was said to be still much the stronger, in that the plaintiffs having inquired by the bill, whether the testator *Stamp* intended the premises should be to the use of the defendant, or that the defendant and the other trustee deceased should receive the profits for their own benefit; the defendant in his answer had said, he could not tell whether the said *Stamp*, the testator, did or [346] did not so intend: and the plaintiffs having prayed by their bill, that if the court should be of opinion they were not intitled to a resulting trust in the whole estate; that in such case they might at least be decreed their arrears of that small annuity of 15*l. per annum* a-piece: the defendant in his answer thereto had insisted on there being a clause in the will, that if the testator's heir at law should dispute the will, then they should forfeit their annuities; and submitted it to the court, whether the plaintiffs had not by prosecuting this their suit forfeited their said annuities.

The Lord Chancellor declared, he very much disliked the defence that had been made in controverting the payment of these small annuities of 15*l. per annum* a-piece to the wives of the plaintiffs, and insisting that they were forfeited by this their bill (*z*); and observed, that the testator plainly intended the annuities of 15*l. per annum* a-piece, to the plaintiffs his sisters and coheirs; and that the surplus of his estate should go to these dissenting ministers; that the defendant's own answer made it appear evidently that he was designed to be but a bare trustee; and the rather, for that a liberal legacy of 300*l.* and likewise the 20*l. per annum* salary were allowed to the defendant; that the subsequent conveyance of the land, and deed of gift of the goods, were not designed to prejudice the charity for the dissenting ministers, but to strengthen it; and it was a further argument of the intention of the testator, that the defendant should not have the premises to his own use, inasmuch as, after the deeds of the land and goods were executed, still they were kept in the custody of the testator; so that as the deeds were intended

Where a subsequent conveyance does not revoke a will.

(*z*) See *Webb* v. *Webb*, ante, 1 vol. 136.

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A trustee misbehaving himself, ordered to pay costs out of his own pocket, and not out of the trust estate.

only by way of trust in the trustees, it was more reasonable to establish this trust on the foot of the will.

And with regard to the annuities; his Lordship decreed, that the arrears and growing payments thereof belonged to the plaintiffs, who were entitled also to their costs; and though it was prayed, that these costs might come out of the estate, (which the defendant urged would be the same benefit to the plaintiffs) yet the court denied it, as tending to lessen the charity, and said, the defendant the trustee had made so ill a defence, as not to have deserved the least favour by this decree. (1)

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(1) Bill dismissed as to every thing but the payment of the annuities, Reg. Lib. B. 1734. fol. 74. Affirmed on a rehearing before Lord *Hardwicke*, 2 Atk. 148. Et vide *Adlington* v. *Cann*, 3 Atk. 141. *Attorney-General* v. *Cock*, 2 Vez. 273. (*y*)

(*y*) *Edwards* v. *Pike*, 1 Eden. 267. *Boson* v. *Statham*, 1 Eden. 508. 1 Cox 16. *Muckleston* v. *Brown*, 6 Ves. 52.

1. Tu. & Cr. 218.
4. —— 78.
1. Keen. 96.

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TERM. S. HILARII, 1734.

HARRIS *v.* POLLARD ET AL'. Case 91.

Sir JOSEPH JEKYLL, Master of the Rolls.

UPON a bill of revivor, one of the defendants by his answer insisted, that the plaintiff was not entitled to revive; but this being insisted on by the answer only, and not by way of plea or demurrer, upon my moving at the Rolls that proceedings might stand revived, his Honour granted the motion, having at the same time spoken with the register touching the practice. Though I apprehended that the practice of reviving proceedings was only upon the defendant's time for answering being out, or upon the defendant's answering and not opposing the revivor. However, his Honour, when he granted my motion, said, the plaintiff ought to shew he had a good title to revive; otherwise at the hearing of the cause he might happen to take nothing by the suit.

2 Eq. Ca. Ab. 2. pl. 4. Revivor. If the defendant's time for answering be out, the court will order proceedings to be revived. So though the defendant by his answer insists that the plaintiff is not entitled to revive; for this ought to be shewn either by plea or demurrer; but if in such case it appears at the hearing that the plaintiff had no title to revive, he cannot have a decree.

4. Tu. & Cr. 78.
1. Keen. 96.
2. Tu. & Cr. 185.

ORLANDO HUMPHREYS, ESQ. AND HELLEN HIS WIFE *v.* SIR WILLIAM HUMPHREYS, BART. [349] Case 92.

Lord Chancellor TALBOT.

THE bill was brought by the plaintiff *Orlando Humphreys*, and *Hellen* his wife, against his father, Sir *William Humphreys*, Bart. for an account of the personal estate of Colonel *Lancashire*, deceased.

2 Eq. Ca. Ab. 170. pl. 26. 172. pl. 3. Parties. In a bill for an account of the personal estate of J. S., though the person who has a right to administer to J. S. be a party, yet this is not sufficient, without administration actually taken out.

HUMPHREYS v. HUMPHREYS.

Colonel *Lancashire* by his will gave 10,000*l.* to his wife *Hellen*, also 10,000*l.* to his daughter and only child *Hellen*, and after some other legacies, disposed of the surplus of his personal estate in manner following: one third to his wife, the remaining two-thirds to his daughter, and made his wife and his brother ——— *Lancashire*, executors of his will, and died.

The defendant, Sir *William Humphreys*, married the widow of Colonel *Lancashire*, and some time after the plaintiff *Orlando Humphreys* married *Hellen* his only daughter; upon which intermarriage the defendant, Sir *William*, made an ample settlement upon his son the plaintiff, *Orlando Humphreys*, and *Hellen* his wife; but afterwards the plaintiff falling out with his father, brought this bill against him for an account of the personal estate of Colonel *Lancashire*: at the time of bringing which bill, *Hellen* the widow of Colonel *Lancashire*, and afterwards the wife of the defendant Sir *William*, was dead, and the brother of Colonel *Lancashire* was dead also; so that there was no executor or
[350] administrator of Colonel *Lancashire*, party to the bill; for which reason the defendant demurred to such part of the bill as demanded an account of the personal estate of Colonel *Lancashire*; which demurrer coming on to be argued before the Lord Chancellor,

It was insisted, that the plaintiff *Hellen*, wife of the plaintiff *Orlando Humphreys*, as she had a *right* to administer to her father, Colonel *Lancashire*, and in regard, though any other person should by surprize get administration to him, yet such person would be a trustee only for the plaintiff *Hellen* the daughter; and as the plaintiff *Hellen* the daughter, who had the only right to the administration, was a plaintiff before the court; this was sufficient, and the court might order that the plaintiff *Hellen* should forthwith take out administration to her father.

Lord Chancellor. There can be no account taken of the personal estate of Colonel *Lancashire*, without making his executor or administrator a party to the bill; for aught appears to the contrary, there may be debts due from Colonel *Lancashire*, which may take up great part of the assets; and therefore the administrator of the colonel must be made a party, (z) else no proper account can be taken; and if any

(z) *Plunket* v. *Penson*, 2 Atk. 51. *Conway* v. *Stroud*, Freem. 188. *Lowe* v. *Farlie*, 2 Mad. 101.

account should in fact be taken, it may be all overhaled again, when such administration shall be taken out. Therefore [A] allow the demurrer. (1)

HUMPHREYS *v.* HUMPHREYS.

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Afterwards, to help this defect, the plaintiff *Hellen*, the wife of the plaintiff *Orlando Humphreys*, took out letters of administration to her father, and charged the same by way of amendment to the bill, having obtained an order for such amendment.

The bill charged, by way of amendment, matters which arose after the filing of the bill, and therefore proper for a supplemental bill; and though this was pleaded to the bill, yet the plea was over-ruled; for that such matters may be charged, either by way of supplemental or amended bill.

To which amended bill the defendant *pleaded* as to that part thereof, which prayed an account of the personal estate of Colonel *Lancashire*, that the taking administration was subsequent in time to the original bill, and therefore it ought to be charged by way of a supplemental, not an amended bill; and the rather, forasmuch as every amendment, though made after filing the original bill, is fixed to, and becomes part thereof; so that the bill was filed by an administratrix, *as such*, and yet would appear to be filed before the administration taken out, and consequently before the right to sue commenced.

But the Lord Chancellor with great clearness (and not without some warmth in respect of the delay) over-ruled (2) the plea, observing, that the mere right to have an account of the personal estate was in the plaintiff *Hellen* the daughter, as she was the next of kin to her father Colonel *Lancashire;* and it was sufficient, that she had now taken out letters of administration, which, when granted, related to the time of the death of the intestate, like the case where an executor, before his proving the will, brings a bill, yet his subsequent proving the will makes such bill a good one, though the probate be after the filing thereof. * Wherefore his Lordship resented this plea as an affected delay, and held that the taking out letters of administration might be charged either by way of supplement or amendment. (3)

Where an executor, before probate, files a bill, and afterwards proves the will, such subsequent probate makes the bill a good one.

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[A] See the case of *Cleland* v. *Cleland*, *Precedents in Chancery* 64. where an objection of this kind was over-ruled, and the making the wife a party, who had possessed herself of her husband's personal estate, and disposed of it, and who appeared to be the person by law entitled to administration, though she denied by her answer that she had taken administration, was held sufficient.

(1) Reg. Lib. A. 1733. fol. 402.
(2) Reg. Lib. A. 1734. fol. 210.
(3) Sed vide contra *Brown* v. *Higden*, 1 Atk. 291.(*y*)

(*y*) *Pilkington* v. *Wignall*, 2 Mad. 240. *Usborne* v. *Baker*, 2 Mad. 379. Sed vide *Knight* v. *Matthews*, 1 Mad. 566.

2. Tu. Ahen. 415.
8. Sim. 552.
(92). 3. Ch. 476.

Case 93.

MALLACK *v.* GALTON.

Lord Chancellor TALBOT.

The equity of redemption of a mortgage comes to a feme covert, against whom and her husband a bill is brought to foreclose; the feme covert shall be foreclosed absolutely, and shall have no time to shew cause after the death of her husband.

IF a feme before her marriage, or the ancestors of a feme, mortgage lands, and the equity of redemption thereof comes to a feme covert; upon a bill brought by the mortgagee to foreclose, the feme is liable to be absolutely foreclosed, though during the coverture, and shall have no day given to her, or her heirs, to redeem after the coverture shall be determined.(1)

In a foreclosure against an infant, though the infant has six months after he comes of age, to shew cause, &c. yet he cannot ravel into the account, nor even redeem, but only shew an error in the decree.

Also, in case of a decree of foreclosure against an infant, though such infant shall have six months time after he comes of age to shew cause against the decree; yet he is not, when he comes of age, to ravel into the account; nor is he so much as entitled to redeem the mortgage by paying what is reported due, but is only entitled to shew an error in the decree. Both these points were clearly laid down by the Lord Chancellor, as agreeable to the constant practice.[B]

[B] In the case of *Lyne* v. *Willis*, heard at the Rolls, 13th of *May*, 1730, this was admitted by the counsel on both sides, and also by the court, to be the settled practice. (*y*)

(1) To a bill by the widow to set aside a decree of foreclosure and to be let into redemption, the mortgagee pleaded the proceedings and decree in the former cause, by which it appeared, that the present plaintiff, while *coverte*, had joined with her husband in a surrender of the copyhold estate in question, which was settled upon her in jointure, and had been foreclosed. And the plea was allowed. Reg. Lib. B. 1734. fol. 189.(*z*)

(*z*) *Burke* v. *Crosbie*, 1 Ba. & Be. 503.

(*y*) So *Bishop of Winchester* v. *Beavor*, 3 Ves. 317. *Williamson* v. *Gordon*, 19 Ves. 114.

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TERM. PASCHÆ, 1735.

3. Bea. 327.
38. Ch. D. 375.

FOWLER *v.* FOWLER.

Case 94.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 156. pl. 5. 355. pl. 22.

Husband on marriage settled 100*l.* per annum pin-money in trust for his wife, for her separate use, which becomes in arrear, and then the husband by will gives the wife a legacy of 500*l.* After which there is a further arrear of the pin-money, and then the husband dies; this legacy being greater than the debt, decreed, even in the case of the wife, to be a satisfaction of the arrears of pin-money due before the making of the will.

THE defendant's deceased husband, in consideration of a marriage then intended, and afterwards solemnized, and of a considerable portion brought by the defendant, settled 100*l.* *per annum* in trust, for her separate use for pin-money; two years' arrears whereof became due, and then the husband made his will; wherein, expressing great affection for his wife, he gave her a legacy of 500*l.* After the making of the will another year's arrear incurred, and then the husband died. The question was, whether the 500*l.* legacy, being more than was due for pin-money, should be deemed a satisfaction for the said arrears?

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First, The Lord Chancellor admitted it to have been the general practice, where there is a debt due from the testator to a third person, and the legacy given to such person is as much or more than the debt, to hold such legacy a satisfaction of the debt; and this being established as a rule, (notwithstanding were it a new point, he should hardly have come into it,) and it had with great reason been urged in opposition to the maxim, *that a man ought to be just before he is bountiful*, that where there are assets, the testator may with as much reason be construed (*a*) both just and bountiful, yet it must be of very ill consequence to unsettle or alter it; because at that rate no counsel would know how to advise his client.

(*a*) Salk. 155.

Secondly, Though in some cases parol evidence had been allowed, in order to shew that the testator designed to give

Parol evidence touching the testator's intention not to be admitted.

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such legacy, exclusive of the debt; yet his Lordship said his opinion was, not to admit such evidence; for then the witnesses, and not the testator, would make the will.(z)

Thirdly, Admitting this to have obtained as a general rule, it was next to be considered, his Lordship said, whether a wife ought to be excepted out of such general rule. Now it was true, there had been, on some occasions, and in some particular cases, a distinction made in favour of a wife, so as to prefer her to any other legatee, as in those of *The Duchess of Beaufort* v. *The Lady Granville*, in the (*a*) House of Lords, and (*b*) *Ball* v. *Smith*, by the Lord *Harcourt*, where the wife, being executrix, and having an express legacy, was also held entitled to the undisposed surplus; yet even with regard to this the court had varied in their determinations. However, since no precedent had been alleged in favour of the wife, as to the point in question, he thought that the legacy given to her being greater than the debt, it ought to be construed a satisfaction of such debt, and that there was no reason to except the wife out of the general rule. But that,

(*a*) 1 Vol. 114.
(*b*) 2 Vern. 675.

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Fourthly, The legacy could not be pretended to be a satisfaction of a debt incurred after the date of the will, and which at that time might possibly never become due. (1)

Where pin-money is secured to the wife, and the husband finds her in clothes and necessaries; this is a bar as to any arrears of pin-money incurred during such time.

Fifthly, Where pin-money is secured to the wife, and it appears that the husband notwithstanding provides the wife with clothes and other necessaries, this, during such time as the wife is so provided for by the husband, will be a (*c*) bar to any demand for her arrears of pin-money.

(*c*) See Vol. 2. 84. Powell *v.* Hankey.

(1) Vide *Chauncey's* case, ante, 1 vol. 409. *Thomas* v. *Bennet*, ante, 2 vol. 343.

(z) But see *Wallace* v. *Pomfret*, 11 Ves. 542; and the cases in the note to *Rachfield* v. *Careless*, ante, 2 vol. 158.

DE

TERM. S. TRINITATIS, 1735.

MILLER *v.* MILLER ET AL'.

Case 95.

Sir Joseph Jekyll, Master of the Rolls.

2 Eq. Ca. Ab. 356. pl. 24. 575. pl. 6. One having by his will given his wife 600*l.* in money, on his death-bed ordered his servant to deliver to his wife, then present, two bank notes, payable to bearer, amounting to 600*l.*, saying, he had not done enough for his wife; this gift is additional, and shall not be construed a payment of the former legacy in the testator's lifetime.

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One having a wife and a son that was his only child, two days before his death made his will, giving thereby to his wife 150*l. per annum*, in long exchequer annuities, during her widowhood. After which the same day he made a codicil, by which he gave to his said wife a further exchequer annuity and 600*l.* in money, to be paid her immediately after his death. Subsequent to this, and about an hour before his death, the testator having called to his servant to reach him his pocket-book, took thereout two bank notes for 300*l.* each, and another note for 100*l.* (not being a cash note, or payable to bearer,) all which notes he ordered his servant to deliver to his wife (then present) adding, that he had not done enough for her. But the wife for some time declined taking these, having, as she said, enough already, and for that it would injure their son, who * was the residuary legatee in the will. Nevertheless, at length she was prevailed on by her husband to accept of the two bank notes, and also the other note. After which the testator by word of mouth gave her his coach and a pair of his coach-horses, bidding three witnesses then present take notice of it, and that he was in his senses, who accordingly made a memorandum thereof in writing.

On a bill brought in the name of the infant son by his *prochein amy*, against the widow and the executors, for an account of the testator's personal estate, it was insisted on behalf of the plaintiff, that since by the codicil a legacy of 600*l.* was given to the wife, payable immediately after the testator's death, the delivery of these two bank notes amounting to just the sum of 600*l.*, was a payment of such

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legacy in the testator's lifetime; and with regard to the other note for 100*l.* which was not payable to bearer, that was merely a *chose en action*, and consequently could not pass by a delivery thereof. Also as to the coach and horses, these were not delivered in the testator's lifetime, for which reason the widow could have no claim to them.

In every donatio causa mortis, delivery must be made by the party in his last sickness; and it may be to a wife, being in nature of a legacy, but need not be proved with the will.

(*a*) See vol. 1. 441. Lawson *v.* Lawson.

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Master of the Rolls. The gift of the 600*l.* contained in the bank notes (*z*) was a *donatio causa mortis*, which operates as such though made to a wife, for it is in nature of a legacy, but need not be proved (*a*) in the spiritual court as part of the testator's will. Neither are gifts of this kind good, unless made by the party in his last sickness.(1) And though in the principal case the sum be the same with the 600*l.* money legacy given by the codicil, yet the manner of giving these notes, together with the expressions * then made use of by the husband, declaring that he had not sufficiently provided for his wife, manifestly shew them to have been designed as additional. On the other hand the wife, by declining at first to accept of them, appears to have been no craving woman.

There cannot be a gift of a bond or chose en action, by way of donatio causa mortis. Neither can any thing operate as such without having been delivered in the testator's lifetime by him or his order.(*t*)

But then as to the note for 100*l.* which was merely a *chose en action*, and must still be sued in the name of the executors, that cannot take effect as a *donatio causa mortis*, in as much as no property therein (2) could pass by the deli-

(1) Sed vide *Bracton*, lib. 2. c. 26. *Jones* v. *Selby*, Pre. Cha. 300. *Ward* v. *Turner*, 2 Vez. 439.(*y*)

(2) In *Lawson* v. *Lawson*, ante, 1 vol. 441, it was determined that a bill drawn by the testator upon his banker in favour of his wife, and delivered by the testator upon his death-bed to the wife, operated as an appointment of so much money to the wife, to take effect after the husband's death. But the court in that case relied upon so many *particular* circumstances, that it does not seem to have afforded any *general* principle.(*x*) Vide 2 Vez. 441. In *Snelgrave* v. *Bailey*, 3 Atk. 214,

(*z*) *Shanley* v. *Harvey*, 2 Eden. 126.

(*y*) S. C. 1 Dick. 170. *Blount* v. *Burrow*, 4 Bro. C. C. 72. S. C. 1 Ves. Jun. 546. *Walter* v. *Hodge*, 2 Swan. 100.

(*x*) And accordingly in *Tate* v. *Hilbert*, 2 Ves. Jun. 120. 4 Bro. C. C. 286. Lord Loughborough, though he approved the judgment in *Lawson* v. *Lawson* upon the circumstances, held generally, that a promissory note made by the testator, or a cheque drawn by him on his banker, could not be the subject of a *donatio mortis causa*.

(*t*) So *Bunn* v. *Markham*, 7 Taunt. 224. 2 Marsh. 532. *Irons* v. *Smallpiece*, 2 B. & A. 552.

very; much less can the widow be entitled to the coach and horses, of which there was no (*a*) delivery in the testator's lifetime.(3)

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(*a*) Admitting the coach and horses not to pass to the widow by way of *donatio causa mortis*,—why could she not be entitled to them as by a nuncupative will?

Lord *Hardwicke* held, that the delivery of a *bond* amounted to a gift (*causa mortis*) of the debt(*w*); which case was afterwards considered by his Lordship in *Ward* v. *Turner*, 2 Vez. 442, and distinguished from the case of a note. *Quære*, Whether the delivery of a mortgage deed will amount to a gift of the money due on the security? vide *Richards* v. *Syms*, cited 2 Vez. 436. *Hassell* v. *Tynte*, Amb. 318.(*v*) In *Ward* v. *Turner*, ub. sup. Lord *Hardwicke* (after a full consideration of the nature of these gifts, and the delivery requisite to give them effect,) determined, that the delivery of receipts for S. S. Annuities did not amount to a gift of the annuities themselves.

(3) Reg. Lib. B. 1734. fol. 535.

(*w*) *Gardner* v. *Parker*, 3 Mad. 184.

(*v*) It is now decided, that delivery of a mortgage deed will not take effect as a *donatio mortis causa*, even though the mortgage was accompanied by a bond. *Duffield* v. *Elwes*, 1 S. & S. 243.: but in *Hurst* v. *Beach*, 5 Mad. 351, where the delivery of the mortgage and bond were to the obligor and mortgagor himself, the court directed an issue, to try whether they were delivered for the purpose of releasing the debt, if the mortgagee died of her then illness.

KING *v.* KING AND ENNIS. Case 96.

1904. 2. Ch. 228.

On an Appeal from a Decree at the Rolls.

THE bill was, that a mortgage made by the testator of a copyhold devised to his nephew, might be discharged out of the personal estate of the testator, and if that not sufficient, out of the rest of the real estate.

Lord Chancellor TALBOT.

Mos. 192. 2 Eq. Ca. Ab. 234. pl. 21. 255. pl. 5. An equity of redemption of a copyhold may be devised without being surrendered to the use of the will.

The testator *Thomas King*, seised in fee of some freehold

Every mortgage, though no covenant or bond to pay the money, implies a loan, and every loan implies a debt; therefore an heir of a mortgagor shall compel an application of the personal estate to pay off a mortgage, notwithstanding there was no covenant, &c. from the mortgagor.

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lands, and also of some copyhold lands in *Hackney* in *Middlesex*, had mortgaged the copyhold for 550*l.* to the defendant *Ennis*, who was admitted upon the said mortgage.

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The testator made his will dated the first of *July*, 1730, whereby reciting that he had surrendered the copyhold to the use of his will, he devised the copyhold premises to his nephew the plaintiff and his heirs; and after all his debts paid, he devised all the rest and residue of his estate real and personal to his son the defendant *Thomas King* and his heirs, leaving his said son executor.

The plaintiff the nephew brought his bill against the testator's son and the mortgagee, setting forth, that there was a bond for the payment of the mortgage money, which the mortgagee by his answer confessed, (and note, this bond was admitted at the hearing at the Rolls) and the words of the will being, "that after all the testator's debts paid, the rest "and residue of all his real and personal estate should go to "his son;" this was said to import, that (*a*) till all the debts were paid, nothing was devised to such son; or that, when the debts should be paid, then and then only he should be entitled to the residue of the testator's real and personal estate. Whereupon his Honour decreed, that first the personal estate should go to pay off this mortgage debt, and afterwards the real estate devised to the son, and then the rents and profits of the real estate that had been received by the son since the father's death.

A devise of one's land after debts paid, is a charge of the debts on the land.
(*a*) See Harris *v.* Ingledew, ante, 91.

And now upon an appeal by the defendant the son, he did not bring the mortgagee to hearing, and it was neither proved that the testator had surrendered the copyhold to the use of his will, nor that there was any bond or covenant for the payment of the money; consequently, it was objected, 1*st*, That the copyhold was not well devised by the will.

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And, 2*dly*, That this was no debt; and in the case of the *South-sea* loans, it had been solemnly determined, that the borrowers were not [personally] liable to pay the money borrowed; and that in the case now under consideration, a very great hardship was endeavoured to be thrown upon an only son, who, were he to pay this mortgage debt, would be left destitute; wherefore the demand was not to be favoured in equity.

To which it was answered, and so ruled by the court, that where a copyholder has mortgaged his copyhold and the

mortgagee is admitted,(*x*) as in the present case, the mortgagor not having the legal estate of the copyhold in him, has no estate that he can surrender, and therefore may (*a*) devise the copyhold premises without any surrender.

As to the second point, the court was of opinion, that every mortgage implies a loan, and every loan implies a debt; and that though there were no covenant nor bond, yet the personal estate of the borrower of course remains liable to pay off the mortgage; and for this was cited a decree of the Lord *Harcourt*, in the case of the mortgage of a ship, where the ship was taken at sea, and there was no covenant for payment of the money; and though the ship could not properly be said to be in nature of a pawn or *depositum*, since the mortgagor had sailed with the same to sea; nevertheless the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. Which case the Lord Chancellor said he well remembered, and that it was so in the case of *Welsh* (*b*) mortgages, where no day certain *is appointed for the payment, but the matter left at large; and that with regard to what had been said of the *South-sea* loans, it had been always taken, that the company gave credit to the stock only that was pledged, and took no notice of, nor made the least enquiry after, the ability or circumstances of the borrower, but depended entirely upon the stock.

(*b*) Vol. 1. 291. All the South-sea loans were advanced on the credit of the stock, without inquiring after the ability of the borrower.

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Wherefore the decree of the Rolls was affirmed upon these two points, (*viz.*) that one may devise an equity of redemption of a mortgage of a copyhold, without having surrendered it to the use of the will; and also, that every mortgage implies a debt, for which the mortgagor's personal estate is

(*a*) The same point was determined *(inter al')* in the case of *Strudwicke* v. *Strudwicke*, by the Lord Chancellor *Parker*, *Paschæ* 1720. (1)

(1) So, *Greenhill* v. *Greenhill*, 2 Vern. 680. *Macey* v. *Shurmer*, 1 Atk. 390. *Tuffnell* v. *Page*, 2 Atk. 37. and Barnard. 9. S. C. *Car* v. *Ellison*, 3 Atk. 73. *Allen* v. *Poulton*, 1 Vez. 121. *Macnamara* v. *Jones*, 1 Bro. C. C. 481.(*y*)

(*x*) Secus where the mortgagee is not admitted. *Doe* v. *Wroot*, 5 East. 132. *Kenebel* v. *Scrafton*, 8 Ves. 30.

(*y*) *Smith* v. *Triggs*, 1 Str. 487. *Doe* v. *Vernon*, 7 East. 8. *Wainewright* v. *Elwell*, 1 Mad. 627.; and see *Harris* v. *Ingledew*, ante, 98. n. (*y*) as to the effect of the stat. 55 G. 3. c. 192.

KING v. KING. liable, although there be no bond (1) or covenant for the payment of the mortgage money. (2)

(1) Vide *Howel* v. *Price*, ante, 1 vol. 294.

(2) Reg. Lib. A. 1733. fol. 528. and 1734. fol. 450. Et vide *Serle* v. *St. Eloy*, ante, 2 vol. 386. *Galton* v. *Hancock*, 2 Atk. 424. *Marchioness of Tweedale* v. *Earl of Coventry*, 1 Bro. C. C. 240. *Philips* v. *Philips*, 2 Bro. C. C. 273. *Ashley* v. *Earl of Tankerville*, 3 Bro. C. C. 545.

3. Ru. Abeer. 440
5. Sein. 164.
6. Ves. 10.

Case 97.

SPETTIGUE *v.* CARPENTER.

Lord Chancellor TALBOT.

S. C. 1 Dick. 66. 2 Eq. Ca. Ab. 93. pl. 5. After an award made, it is too late to confirm the submission so as to make it good within the act of 9 & 10 W. 3. cap. 15.

ON a bill to set aside an award, the case was: There were several stated accounts between the plaintiff and defendant, whereby considerable sums were due from the defendant to the plaintiff; but the arbitrator, without regard to any of these stated accounts, made up an account in his own way, bringing in the plaintiff indebted to the defendant 25*l.*, and awarding the former to assign over to the latter a mortgage which he had on the other's estate, upon which mutual releases were to be given.

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A party submitting to an award desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him; though this was within two or three days before the time for making the award was out, yet the request not being complied with, the award was held ill.

The plaintiff, understanding what award the arbitrator was about to make, sent a messenger about two or three days before the time for making the award * was expired, to let the arbitrator know, that the plaintiff desired him to defer making his award, until he should talk with him about his demands, to support the stated accounts, and know what objections were made against them. However, the arbitrator would not defer making the award. The submission was confirmed by an order of the court of chancery: but such confirmation was *after* the award was made.

For the defendant it was insisted, that this submission being confirmed by an order of the court, pursuant to the statute of the 9th and 10th of *W.* 3. cap. 15. it could not be set aside, but for corruption, or some other undue means; and that in point of time the party was confined to make his

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complaint even as to that, before the end of the next term after the award was made.

The Lord Chancellor called for the act, and having read it, took notice, 1*st*, that it is thereby provided, that where the submission is confirmed by rule of court, the award that *shall* be made shall be conclusive to both parties, and the performance of it enforced by process of contempt of the court; so that within this act the confirmation must be *prior* to the making of the award. (*y*) 2*dly*, That with regard to the time within which the complaint was to be made, it was in this case impossible for the party to apply within a term after the award made, because the submission was not confirmed by an order of this court, until the end of the next term after making the award. (*x*) 3*dly*, That with respect to the reasons allowed by the act for setting aside the award, they are corruption, or other undue means. (*w*) Now it was acting unduly to proceed in making the award, when the plaintiff had desired to be heard against the arbitrators determining in contradiction to so many stated accounts.

And though it was answered, that this was within two or three days before the time for making the award expired, and with an intent that no award should be made; and though it did not appear, that the plaintiff was ready to be heard within the time; yet, forasmuch as here seemed to be just ground for the plaintiff to desire to be heard, and in regard it would be difficult to assign a reason for rejecting so many stated accounts, so lately allowed and passed between

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(*y*) The practice of the courts is not in conformity to this opinion. See *Alardes* v. *Campbell*, 1 Barnard. in K. B. 152. *Chicote* v. *Lequesne*, 2 Vez. Sen. 315. *Pownall* v. *King*, 6 Ves. 10. *Fetherstone* v. *Cooper*, 9 Ves. 67. *Smith* v. *Symes*, 5 Madd. 74.

(*x*) With respect to the time limited by the statute, which is a bar only to an application to set aside the award, and cannot be insisted upon in support of an application to enforce it, see *Zachary* v. *Shepherd*, 2 T. R. 781. *Pedley* v. *Goddard*, 7 T. R. 73. *Lowndes* v. *Lowndes*, 1 East. 276. *Davis* v. *Getty*, 1 S. and S. 413. *Dawson* v. *Sadler*, 1 S. and S. 540. *Auriol* v. *Smith*, 1 Turn. 121.

(*w*) *Anderson* v. *Coxeter*, 1 Str. 301. But the legality of an award may be questioned on other grounds appearing on the face of the award, at any time when the adverse party attempts to enforce it by attachment or otherwise. *Holland* v. *Brookes*, 6 T. R. 161. *Pedley* v. *Goddard*, *Lowndes* v. *Lowndes*, *Auriol* v. *Smith*, *Dawson* v. *Sadler*, ub. sup.

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both the submitting parties, the court set aside the award with costs. (1)

(1) Reg. Lib. B. 1734. fol. 492.

2. Tr. Hlee. 757.

Case 98.

SIR EDWARD BETTISON *v.* ALBINIA FARRINGDON and her two Sisters.

Lord Chancellor TALBOT.

The plaintiff claimed by virtue of a remainder in tail expectant on tenant in tail's dying without issue, and was the heir male of the family. The defendants were sisters and heirs general of the tenant in tail, and by their answer shewed, that their brother, the tenant in tail, suffered a recovery, declaring the use to himself in fee, and refer to the deeds in their custody; the court ordered, before the hearing, the defendants to leave with their clerk in court the deeds making the tenant to the præcipe, and leading the uses of the recovery.

SIR *Edward Bettison*, deceased, was tenant in tail of a considerable estate in *Kent*, remainder in tail to the plaintiff's father, remainder to Sir *Edward Bettison*, deceased, in fee. Sir *Edward Bettison* did by lease and release, make a tenant to the *præcipe*, and suffer a common recovery, declaring the uses to himself and his heirs: after which, on his dying intestate and without issue, the defendants, his three sisters, entered on the premises; and now on the death of the plaintiff's father, the present Sir *Edward Bettison* brought a bill to discover what title the defendants had, who by their answer shewed, that their brother, the late Sir *Edward Bettison*, did execute the said lease and release, and also suffered this recovery to the use of himself in fee, referring to the deeds in their custody.

[364] The plaintiff on motion, without notice, obtained an order from the Master of the Rolls, that the defendants should produce, and leave with their clerk in court, the lease and release. Upon which I moved the Lord Chancellor to discharge such order, for that as the defendants were sisters and heirs at law to Sir *Edward Bettison* lately deceased, and also heirs to Sir *Edward Bettison*, the first ancestor, and claimed under a common assurance, the court would not assist (1) the plaintiff in picking holes in their title, nor compel them, at least not before the hearing, to produce their deeds; that both parties were volunteers, in which

(1) *Buden* v. *Dore*, 2 Vez. 445.

case it was not usual for the court to interpose, or give the least assistance to either.

Lord Chancellor. Though both parties are volunteers, yet it is of some weight, that the (*a*) honour of the family is descended on the plaintiff; and as at the hearing (*z*) you admit the court would do what has been desired, so it is for the benefit of all parties, that it should be done before the hearing; for if the deed be a proper one to make a tenant to the *præcipe*, the plaintiff will go no further, which will put an end to the suit. And the defendants, by referring to the deeds in their answer, have made them (*b*) part thereof. Wherefore I think the order that has been made at the Rolls a reasonable one, and will not set it aside. (*y*)

(*a*) See Vol. 2. 178.

(*b*) *Quære.* Whether the bare referring to a deed, without setting it forth *in hæc verba* will make it part of the answer? And see ant' 35. the case of *Hodson* v. the *Earl of Warrington*.

(*z*) See *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 66. where Lord Loughborough, Chancellor, conjectures that the words "at the hearing," mean at the trial.

(*y*) A plaintiff is entitled to the production of a deed which sustains his title: but he has no right to the production of a deed which is not connected with his title, and which gives title to the defendant. *Sampson* v. *Swettenham*, 5 Madd. 16. *Lady Shaftesbury* v. *Arrowsmith*, ub. sup. *Aston* v. *Lord Exeter*, 6 Ves. 288. *Hylton* v. *Morgan*, 6 Ves. 293. *Atkyns* v. *Wright*, 14 Ves. 211.

1 Tu. & Cr. 160.

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CHAPLIN *v.* CHAPLIN.

Case 99.

Lord Chancellor TALBOT.

One has a son and three daughters, and is seised of some lands in fee, and of others in tail, and by his will devises his fee-simple lands to his daughters, and dies leaving all his children infants. His widow takes the profits of both estates as guardian to her children; and in a bill brought by the son and daughters against the mother for an account of the personal estate and of the rents and profits of the real estate, the mother swears, that she has paid bond debts due from the testator out of the intailed estates, and afterwards dies insolvent. As the answer cannot be read against the daughters, and there is no other evidence, and since the guardian ought to have paid the bonds only out of the fee-simple estate; payment shall be intended to have been made only out of the fund, which ought to have borne it.

PORTER CHAPLIN, on his marriage with *Ann* his wife, settled a considerable estate of inheritance on himself for life, remainder as to part on his wife for a jointure, remainder as to the whole upon the first and every other son of the marriage in tail male, with remainders over. *Porter Chaplin* had one son and three daughters, and being seised of some fee simple lands, and particularly of an estate of about 30*l.* *per annum*, not included in the settlement, and likewise

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seised of a leasehold estate for three lives, did by his will devise all his fee-simple lands (except the lands of about 30*l.* *per annum*) to his three daughters in fee, and gave several specific legacies, without making any disposition of the lands of about 30*l.* *per annum*, or of the leasehold estate for three lives, and died indebted by bond in the sum of 3000*l.* and upwards, and leaving debts by simple contract to very near the amount of his personal estate, and leaving all his children infants.

His widow entered as guardian to her son, and also to her three daughters, upon their several estates, and in her answer to a bill brought by her infant children to have an account of the real and personal estate of her late husband *Porter Chaplin*, she swore, that she, during the infancy of her son and daughters, received the rents and profits of the estate settled on the son, and of the fee-simple estate, that was devised to the daughters, and that out of the rents and profits of the son's *settled estate*, she paid the bond debts. Afterwards the mother died insolvent.

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Lord Chancellor. The answer of the mother cannot be read against the daughters, who do not claim under her; it can only be read against herself and her representatives; and since it is not read to charge her, but to charge her daughters, it cannot be read at all.

But then it being insisted, that the bonds being paid out of the settled estate belonging to the son, the mother's administrator should stand in the place of the bond creditors, and be entitled to recover the money against the fee-simple estate devised by the testator, the obligor in these bonds, to his three daughters, and consequently, by the statute of fraudulent devises, liable to the payment of the bond debts.

Lord Chancellor. The answer of the mother not being to be read against the daughters, and there being no other evidence, I will presume, that the mother applied the rents and profits of the daughters' estate towards the payment of these bonds, as far as the same would extend; for this is what in justice she ought to have done, in as much as the rents, &c. of the lands devised by the obligor were liable to the bonds in the devisees' hands, and the rents of the lands settled on the son were not liable: this I will rather presume, than that the mother did what she ought not to have done, in applying the rents, &c. of the son's estate, that was settled, towards the discharge of these bond debts, to which it was not liable.

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And his Lordship declared it was not material, whether she did in fact apply these rents, &c. of the daughters' estate towards the bonds; for still these rents, &c. when received by the mother, shall be taken to reimburse her what she had paid out of the son's settled estate to the bond creditors; for this money was at home, when received by the mother, and must go towards reimbursing her, and sinking her demands arising by her having paid the bond debts. It was further held by the Lord Chancellor, that the lands permitted to descend to the son, the heir at law, must be liable to the bonds in the first place [A], before the lands devised to the daughters, and before the specific legacies.

One dies indebted by bond, and seised in fee of divers lands, part of which he devises to J. S. and other part he permits to descend to his heir; the lands descended shall in the first place be liable to pay the bonds.

In the next place, there arose a question, whether, as the leasehold estate made to the father for three lives came to the son on the death of the father, the parol should not demur during the infancy of the son?

Whereupon his Lordship held, that in the case of lands in fee descending on an infant, the parol shall demur (2) in

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[A] The reporter here adds the following note: the reason why, where a man dies indebted by bond, and devises some lands to *J. S.* and leaves other lands to descend to the heir at law, not mentioning them in his will, the lands descending to the heir shall be first applied to pay the bond debts, is, because the applying the lands devised to *J. S.* to pay the bond debts, would disappoint the will, which equity will not permit, if it can be avoided; whereas it no way disappoints the will to say, that the lands not mentioned should be in the first place liable to pay the debts. But it seems it would be otherwise, if the testator had devised the lands, though to his heir at law; for though such devise were void, (as to the purpose of making the heir take otherwise than by descent) yet it shews the testator's intent, that the heir should have this land; and therefore (I take it) the devised lands to *J. S.* and the other lands devised to the heir at law shall in this last case contribute in proportion to pay the bond debts. Also, for the above-mentioned reason, (I should think) the lands permitted to descend to the heir at law, and not mentioned in the will, shall be applied to pay the bond debts before a specific legacy, lest otherwise the testator's intention should be disappointed. (1)

(1) Vide *Howell* v. *Price*, ante, 1 vol. 294, note. *Long* v. *Short*, ante, 1 vol. 403. *Clifton* v. *Burt*, ante, 1 vol. 678. *O'Neal* v. *Mead*, ante, 1 vol. 693.

(2) Vide *Creed* v. *Colville*, 1 Vern. 173. *Davison* v. *Goddard*, Gilb. 66. *Scarth* v. *Cotton*, Ca. temp. Talb. 198. *Uvedale* v. *Uvedale*, 3 Atk. 117. (*x*)

(*x*) *Sweet* v. *Partridge*, 1 Cox 433. 2 Dick. 696. The parol will not demur where the suit is against an infant devisee under the 3 W. & M. c. 14. *Plaskett* v. *Beeby*, 4 East 485. The words of the judgment in *Powell* v. *Robins*, 7 Ves. 209. may seem opposed to this case: but there the infant de-

CHAPLIN v. CHAPLIN.

Lands are given to A. and his heirs for three lives; A. dies; his heir does not take by descent, so as to have his age, or to make the parol demur, but takes as special occupant; though had it been in the case of lands in fee descending on an infant, the parol should have demurred in equity as well as at law.

equity as well as at law; because an infant is equally incapable of defending himself in one court as in the other; and the equitable assets may be of as great value as the legal; but where a lease is made to a man and his heirs, during three lives, the heir does not take by [B] descent, but as a special occupant, and such special occupancy was not liable to pay debts, until the statute of frauds made it assets; and though it be called a descendible freehold, it is not really a descent, being no more than if there had been a (*a*) designation of any other person by name to enjoy the estate for three lives, after the death of the father, instead of the heir at law. (3)

(*a*) Ante 263. Low *v.* Burron.

An allowance of maintenance to a guardian must be in regard to what the infant then had, and not to what falls in afterwards.

Lastly, in the principal case, the three daughters had two several sums of 10,000*l.* left them, to take effect on their father *Porter Chaplin*'s dying without issue male that should attain the age of twenty-one, charged on several terms for years commencing on that contingency; but the daughters had otherwise very little to subsist on; and the mother had a very plentiful jointure of about 1000*l. per annum*, out of which, for several years, the daughters were maintained; and on the son's dying without issue male before twenty-one, the daughters became entitled to the additional sums above-mentioned; whereupon, after the mother's death, on an account [369] taken of her assets, her administrator demanded a liberal allowance for the maintenance of those daughters, who were now so plentifully provided for.

But by the Lord Chancellor. The allowance to be made to the mother for maintenance must have regard to what the daughters were entitled to at the death of their father; and, until the contingency fell in, shall not exceed the income of such their original portions.

[B] For the same reason, where a disseisor makes a lease to a man and his heirs, during the life of *J. S.* and the lessee dies, living *J. S.*, this shall not take away the entry of the disseisee. 1 *Inst.* 239.

(3) Reg. Lib. A. 1734. fol. 593. by the name of *Chaplyn* v. *Ayscough.*

visee was also heir at law. See *Lechmere* v. *Brasier*, 2 J. & W. 290. as to the parol demurring in suits under the 47 G. 3. sess. 2. c. 74. Where estates are devised to an infant heir at law charged with payment of legacies, the parol shall not demur as to the legacies, nor consequently as to debts. *Mould* v. *Williamson*, 2 Cox 386.

2. Tu. & Cr. 109.

MARGARET AND ANN TOURTON *v.* FLOWER ET AL'.

Case 100.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 78. pl. 9.

JOHN CLAUD TOURTON, a great banker at *Paris*, made his will, and thereby gave several legacies, and made one *Theluson*, a *French* Protestant, residuary legatee, and one *Hammond*, an advocate of the parliament at *Paris*, executor, and died.

The testator had two brothers, who were both dead; but each of them left a son, who were (or at least alleged they were) next of kin to the testator *Tourton;* and these two nephews commenced a process at *Paris*, to set aside this will, pending which suit both the nephews died; and their mothers, the now plaintiffs, took out letters of administration to their respective deceased sons out of the spiritual court at *Paris*, and then proceeded in their suit to set aside the will of *Tourton*. Whereupon a sentence was obtained to set aside that part of the will, by which the residuum was devised to this *Theluson*, by reason (as was said) that he was a Protestant. The sentence at *Paris* also ordered, that *Theluson* should account for so much of the assets as he had received to the now plaintiffs, and deliver up to them all [370] securities, books, and writings, relating to the personal estate of *Tourton* the testator. *Hammond* the executor died; and one *Pansier* took out letters of administration in the prerogative court of *Canterbury*, with the will of *Tourton*, the banker, annexed.

And now the plaintiffs, the mothers, brought their bill against the defendants *Flower* and *Pansier* the administrator with the will annexed, shewing, that several bonds, mortgages, and securities, belonging to *Tourton* the banker, were taken in the name of the defendant *Flower*, for which the defendants ought to account.

The defendant *Flower* demurred, there being no representative of the testator *Tourton* before the court; for though *Pansier*, the administrator with the will annexed, was made a defendant, yet it did not appear but that *Hammond* the executor had made a will, and left an executor; in which case the administration granted by the Archbishop of *Canterbury* to *Pansier* would be void.

TOURTON v. FLOWER.

One sues as administrator of J. S. without shewing, that J. S. died intestate; yet an administration taken out of the Archbishop's court shall be intended to be a good administration.

But by the Lord Chancellor. Here being an administration taken out of the Archbishop's court, I will look upon the same to be good.

Then it was said for the defendant, that admitting the demurrer to be ill, for that there was a representative of the testator *Tourton* before the court, still there wanted proper parties; because there ought to be administration taken out by the plaintiffs, the mothers, to their sons. Now, though the mothers had obtained letters of administration in the spiritual *court at *Paris*, yet this was nothing to the purpose, as it could not be taken notice of in our courts; and though, it was true, this was not the demurrer upon record, yet the defendant was at liberty to demur at the bar *ore tenus*.

Administration granted in a foreign court (as at Paris) not taken notice of in our courts.

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Lord Chancellor. The defendant may demur at the bar *ore tenus* (z); and this demurrer, for want of the plaintiffs having taken out a good administration to their sons, is a sufficient cause, for without it the plaintiffs can have no right, and our courts can take no notice of what is done in the spiritual court beyond sea: therefore the demurrer must be allowed, but *without costs;* because the demurrer on record was an ill one, and the plaintiffs not to blame to argue it; but then neither ought the plaintiffs to have costs, the bill appearing to be ill, and to want parties, forasmuch as proper administrators to the sons are not before the court.

One may demur anew at the bar ore tenus; but then, on its being allowed, he cannot have his costs.

Note. What is said in 1 *Vern.* 78, *Durdant* v. *Redman*, that costs ought to be paid for a new demurrer insisted on at the bar *ore tenus* is not now the practice.(y)

(z) But it must be to that to which he has demurred on the record. *Pitts* v. *Short*, 17 Ves. 215. And he cannot demur by parol when he has put in a plea only. *Durdant* v. *Redman*, 1 Vern. 78. *Hook* v. *Dorman*, 1 S. and S. 231.

(y) *Broderip* v. *Phillips*, in note to *Durdant* v. *Redman*, ub. sup. *Wood* v. *Thompson*, 2 Dick. 510. *Cawthorn* v. *Chalie*, cited in Beames on Costs, 224 n. (26): but see *Attorney-General* v. *Brown*, 1 Swan. 288, where Lord Chancellor Eldon says, the defendant availing himself of a demurrer ore tenus must pay the costs of that on the record.

TAYLOR *v.* SHARP.

Case 101.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 177. pl. 19.

If a decree be obtained, and enrolled, so that the cause cannot be reheard; then there is no remedy but by bill of review, which must be on error appearing on the face of the decree, or on some new matter, as a release, or a receipt discovered since.

IN this case it was laid down as a rule by the Lord Chancellor, that if a decree be obtained, and that decree enrolled, so that the cause cannot be reheard upon petition; the party grieved can in no case set aside this decree, or obtain relief against it by an original bill; for then the decrees of the court would * be opposite and contrary the one to the other, which would breed the utmost confusion. Wherefore the only remedy in such case is by bill of review, which must be either for error appearing upon the face of the decree, or upon some new matter, as a release, receipt, &c. proved to have been discovered since; for unless this relief were confined to such new matter, it might be made use of as a method for a vexatious person to be oppressive to the other side, and for the cause never to be at rest. (1)

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(1) Vide *Standish* v. *Radley*, 2 Atk. 177. *Gould* v. *Tancred*, 2 Atk. 533. *Norris* v. *Le Neve*, 3 Atk. 27. *Wortley* v. *Birkhead*, 3 Atk. 809., and 2 Vez. 571. S. C. (z)

(z) *Anon.* Freem. 31. *Lord Portsmouth* v. *Lord Effingham*, 1 Vez. Sen. 430. *Worge* v. *Bradley*, 2 Dick. 570. *Wilson* v. *Webb*, 2 Cox, 3. *Willan* v. *Willan*, 16 Ves. 86. *Young* v. *Keighley*, 16 Ves. 348. *Perry* v. *Phelps*, 17 Ves. 173. *O'Brien* v. *Connor*, 2 Ba. & Be. 146. *Manaton* v. *Molesworth*, 1 Eden, 25.

(92) 1 Q. B. 783.

VICK *v.* EDWARDS.

Case 102.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 473. pl. 6.

Lands are devised to A. and B. and the heirs of the survivor in trust to sell; though the inheritance be in abeyance, yet the trustees by a fine may make a good title by estoppel.

A. DEVISED lands to *B.* and *C.*, and the survivor of them, and the heirs of such survivor in trust to sell. The estate was decreed to be sold; and it being referred to the Master to see, whether the parties could make a good title, the Master reported that the parties could not make a good title, there being no fee-simple in the trustees, for that the re-

VICK v. EDWARDS.

mainder in fee could only be vested in the survivor, and it was uncertain which of the two trustees would be the survivor.

Whereupon, exceptions being taken to the Master's report, the Lord Chancellor held, (1) that the trustees joining in a fine of the premises would pass a good title to the purchaser by estoppel (*a*); that here the fee was in abeyance, and as, where the eldest (*b*) son of tenant in tail levies a fine, and survives his father, though he afterwards dies without issue, yet this will pass a good title, as long as the tenant in tail has issue, and thereby conclude the youngest son, who must derive his descent from the eldest, notwithstanding the latter at the time of the fine levied had nothing. So in the principal case it was certain one of these two trustees must be the survivor, and entitled to this future interest; consequently, his heirs claiming under him would be estopped, by reason of the fine levied by their ancestor, to say *partes finis nihil habuerunt*, although he that levied the fine had at that time no right or title to the contingent fee. (2)

(*b*) Bradstock *v.* Scovel, Cro. Car. 434, 543.

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And it being said by the counsel, that the heir of the devisor would join in the conveyance to the purchaser; his Lordship replied, that the heir's joining would supply the want of proving the will, but that in every other respect it would be void. And the next day his Lordship cited the case of *Weale* v. *Lower*, in *Pollexfen's Reports*, 54, where a fine was adjudged to pass an estate not vested, by way of estoppel, and to convey the interest of such estate which accrued by the contingency happening afterwards.(*z*)

(*a*) *Quære*, If any thing could operate by way of estoppel in this case, because an interest passed? See 1 Inst. 45. *a*. 47. *b*.

(1) Reg. Lib. B. 1734. fol. 424.
(2) Vide Harg. Co. Litt. 191. *a*.

note 1. Fearne's Cont. Rem. 4th Edit. 1 vol. 522.

(*z*) *Helps* v. *Hereford*, 2 B. & A. 242.

LUXTON *v.* STEPHENS. Case 103.

Lord Chancellor TALBOT.

2 Eq. Ca. Ab. 241. pl. 31.

An heir at law is made a defendant, and insists on his title; he shall have his costs, though it goes against him; but if an heir at law be plaintiff, and miscarries in his suit, he shall not have costs; but, on his suit appearing to be groundless, shall pay costs.

THE plaintiff was the eldest son and heir of *J. S.*, and claimed as issue in tail under a settlement. The defendant entitled himself under the tenant in tail, and shewed that the tenant in tail had suffered a recovery. The plaintiff brought a bill for a discovery of the writings and of the deed of settlement, and the defendant insisted that the entail was cut off by a recovery.

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The cause being heard, it was decreed that the writings should be brought before a Master, and the bill retained for a twelve-month; and in the mean time the plaintiff to try his title in an ejectment. Accordingly the plaintiff brought an ejectment, when a verdict was found for the defendant.

And the matter coming on upon the equity reserved touching costs; on the behalf of the plaintiff it was objected, that he was an heir at law, and appeared now to be a disinherited heir; that he had a probable cause of suit; and it was enough for him to lose his estate, without being punished with costs into the bargain, which would be *afflictionem afflicto addere.*

Lord Chancellor. When an heir is made a defendant to a bill brought to prove a will, there he shall have his costs(*a*); but in the present case he is plaintiff, and comes here for the aid of the court, and to be furnished with the deed of settlement, which aid he has had; and at length it appears that this his application to the court was groundless, for that his title is barred by the common recovery of his ancestor, which *prima facie* is to be presumed regular, and there is no fault in the defendant, nor any reason he should lose his costs. On the contrary the plaintiff, in contesting the common recovery suffered by his ancestor, appears to have been in the wrong, and ought to pay the costs of the suit.(*z*)

(*a*) Even though he cross-examines the plaintiff's witnesses, and refuses to release his right; otherwise, if he examines witnesses of his own. See vol. 2. 285. *Bidulph* v. *Bidulph.*

(*z*) *Seal* v. *Brownton*, 3 Bro. C. C. 214. *Rashley* v. *Masters*, 1 Ves. Jun. 205. *White* v. *Wilson*, 13 Ves. 90. *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316. *Blinkehorne* v. *Feast*, 1 Dick. 153, and see *Shales* v. *Barrington*, ante, 1 vol. 482.

Case 104. MARGARET SHARP *v.* RICHARD CARTER AND WILLIAM EVANS.

Lord Chancellor TALBOT.

Defendant not bound to answer what tends to accuse him of maintenance, or of buying pretensed rights within the statute of 32 H. 8.

ONE *William Jennings* was seised in fee of the manor of *Turner's Court*, in *Oxfordshire;* and having no issue nor wife then living, and having a sister, the plaintiff, that was his heir at law, (but whom he never corresponded with, nor shewed any kindness to, having frequently declared he would leave his estate to his wife's son, one *John Evans*, with whom in his life he had entrusted the management of his estate and concerns, to whom he had given the keys of his closet where all his writings were); this *William Jennings* made his will dated the 5th of *November*, 1731, whereby he devised the premises to the said *John Evans* in fee. But the plaintiff set up another will made subsequent to the former, and bearing date the 18th of *January*, 1731-2, whereby the said testator *Jennings* devised the premises to his sister the plaintiff *Margaret Sharp* in fee. There were some circumstances by which it appeared, that the plaintiff *Margaret Sharp* did herself seem to mistrust the will under which she claimed. But at length she brought an ejectment, which being tried at the assizes at *Oxon*, she there recovered a verdict. Also some part of the premises being in lease, and the leases in the possession of the defendant *Evans*, who claimed under the first will, the testator's sister *Sharp* brought her bill in this court against the said *John Evans*, shewing that the leases then subsisting of good part of the premises did hinder the plaintiff's proceeding in the ejectment, and praying that the matter might be tried by an issue, *devisavit vel non.*

[376] The court directed the said issue to be tried at the bar of *B. R.* by a special jury, which accordingly was tried, and a verdict found for the plaintiff the testator's sister.

Whereupon a decree was made, that the plaintiff should hold and enjoy the premises; and that the defendant *Evans* should deliver up all the deeds and writings to her. The title deeds were demanded of the defendant *Evans*, and he for not delivering them imprisoned in the *Fleet*, where he died. And now the plaintiff *Margaret Sharp* the sister, brought a bill against the defendant *Carter* and *William*

Evans, the son and heir of the said *John Evans*, setting forth these recoveries of the two verdicts; that the defendant *Evans's* father died in prison in contempt, without having delivered up the title deeds; and that the defendant *Carter* had got several of these deeds in his possession, pretending to have made a contract with the said *John Evans*, (the devisee by the first will) for the purchase of the real estate late of the said *William Jennings*, and to have advanced some money on that account; and the bill charged, that if the defendant *Carter* did make any such contract, it was after he had notice of the will under which the plaintiff claimed; and that such money was advanced by the defendant *Carter* on account of suits, and to carry them on.

As to such part of the bill as prayed a discovery of any and what monies paid or advanced by the defendant *Carter* to *Evans*, on account of the suits in the bill mentioned, or for carrying on the same; it appearing that the defendant *Carter* was not a party to the said suit in the bill so charged to have been carried on: the defendant *Carter* demurred [377] thereto; for that the praying of such discovery had a tendency to charge the defendant with maintenance. Also, as to such other part of the bill, which sought to discover any contract or agreement made or supposed to be made between the defendant and the said *Evans*, for the defendant *Carter's* becoming a purchaser of any part of the real estate in the bill mentioned to have been late the estate of the said *William Jennings;* the defendant pleaded the statute of 32 *H.* 8. *cap.* 9. *sect.* 2. made against selling or contracting to sell any *pretensed (i. e.* controverted) rights or titles, "whereby "the person bargaining, giving, or selling, their antecessors, "or they by whom they claim, must have been in possession "of the same, or of the reversion or remainder thereof, or "have taken the rents or profits thereof, by the space of one "whole year next before the said bargain, &c. made; upon "pain that he that shall make any such bargain, sale, cove-"nant, promise, or grant, shall forfeit the whole value of the "lands, &c. so bargained, &c. and that the buyers and takers "thereof knowing the same, shall forfeit also the value of the "said lands, &c. so by him bought and taken as aforesaid, "one moiety to the king, the other to the informer." And in regard that, if any such contract or agreement had been made betwixt *Evans* and the defendant *Carter*, for his becoming a purchaser of the premises, it was made after that

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Evans was put out of possession by order of this court, and a receiver appointed for the same; the defendant pleaded the said statute of 32 *H.* 8., and that the plaintiff's seeking such discovery did tend to subject the said defendant to the forfeiture of the value of the land in the bill charged to have been contracted for; and the defendant disclaimed any right

[378] to the premises otherwise than by a mortgage that he had thereon, and disclaimed any right to the title deeds; and by his answer said, he had delivered back all the said deeds to the mortgagor *Evans*, from whom he received the same. Also, the defendant by his answer said, that at first he lent 100*l.* to the said *Evans* on his bond only, and that he afterwards lent another 100*l.* to the said *Evans*, and took the said *Evans's* mortgage of the said manor for his security.

It was said for the defendant *Carter*, that the bill as to him, being only for the title deeds, and he having sworn that he had delivered all of them back to *Evans* the mortgagor, from whom he had received them; the rest of the charge of the bill could not be relevant; but now appeared to be thrown in only to satisfy the plaintiff's curiosity, or to subject the defendant to further trouble on some criminal prosecution; and that the advancing of money towards carrying on a suit to which the defendant was no party, must be maintenance, unless where the person so advancing, &c. be the husband, father, or guardian, and so on that account allowed to disburse the money; and that if this were but doubtful, the court ought not to compel an answer.

On the other side it was urged, that the advancing money, unless the party advancing was to have part of the thing recovered, is not maintenance.

A person interested in the premises (as a mortgagee) though he be no party to the suit, may expend money in supporting the title, without being guilty of maintenance. (*a*) See Moor. 656.

Lord Chancellor. Unless every advancing of money towards carrying on a suit for a third person be maintenance, (which I think is not) then the defendant *Carter* cannot in the present case be guilty thereof; because he appears to be a party interested (*a*) *by virtue of the mortgage so made to him as aforesaid; and though he be no party to the suit, yet as he claims a mortgage on the estate, he may lay out money in supporting the title: wherefore this not being maintenance, the demurrer is ill.

[*379] But the plea of the statute of 32 *H.* 8. against contracting for pretensed, *i. e.* controverted rights, seems to be good.(*z*)—

(*z*) *Hitchins* v. *Lander*, Coop. 34.

Not that I think the appointing a receiver is, in every case, a turning the party out of possession. For instance, where an infant is entitled, in such case there can be no colour to say, that the appointing a receiver (which is truly and properly the hand of the [C] court) puts the infant out of possession. But where there is an adversary suit, and two persons (as in the present case, the plaintiff *Sharp* and *Evans,)* are contending for the right, and the plaintiff *Sharp* brings her bill against *Evans*, in order to recover the possession; and *Sharp* having on the first verdict obtained by her procured a receiver to be appointed, and such receiver having been, on the last verdict that was recovered at the bar of the King's Bench, ordered to surrender up the possession to the plaintiff *Sharp:* I cannot in this case call the possession of the receiver the possession of the defendant *Evans;* but rather the possession of the plaintiff *Sharp*, who appears to have the right to the premises. Neither can I say, or *hold, that the defendant *Evans* was the person in possession for a year next before the defendant *Carter's* contracting for the purchase of the estate; and since it may be putting a difficulty on the defendant *Carter* to compel him to answer to this part of the bill, I do therefore allow the plea of the statute of 32 *H.* 8. against the contracting for pretensed (or controverted) rights or titles. (1)

SHARP *v.* CARTER.

The appointing a receiver is not in all cases a turning the party out of possession; as where a receiver is appointed of an infant's estate, in such case the receiver's possession is the possession of the infant; but on the appointing a receiver in an adversary suit, as where the plaintiff in ejectment has recovered a verdict; here the receiver's possession seems to be the possession of him that has the right to it.

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[C] For this reason the court will proceed to put a receiver in possession in a summary way; and will order the tenants to attorn to him, and grant him a writ of assistance, without first awarding an injunction for the possession, which in other cases is the usual process. 4th of *Oct.* 1718, by the Lord *Parker*.

(1) Reg. Lib. B. 1734. fol. 392.

DE

TERM. S. MICHAELIS, 1735.

Case 105.

BLUE *v.* MARSHALL ET UX'.

On the Defendant's Exception to the Master's Report after Hearing.

11. Seiss. 114.

Lord Chancellor TALBOT.

THE plaintiff was the widow of *James Blue*, who by his will gave a legacy of 200*l.* to trustees, in trust for the testator's wife for her life, and afterwards for his daughter the defendant, *Ann Marshall*, for her life, and afterwards to her children the plaintiffs. The bill was brought to compel the defendant *Marshall*, and his wife, (who, on the executor's renouncing, had taken administration to her father with the will annexed) to pay this 200*l.* into the hands of the trustees, to the intent the plaintiff, the widow, might have the interest for her life. The defendant insisted upon want of assets.

2 Eq. Ca. Ab. 454. pl. 13. Though, generally speaking, an executor or trustee compounding or releasing a debt, must answer for the same; yet, if this appears to have been for the benefit of the trust estate, it is an excuse.

[*382] * On the hearing of the cause the decree was, that the defendants should account for such part of the personal estate of the testator *Blue*, as came to the defendants' hands, or to their use. The Master reported, that the testator *Blue* was possessed of a term for sixty years in a messuage and lands at *Bethnal Green* in *Middlesex*, which the testator had let to one *Dallow*, for thirty years, at 100*l.* *per annum*, which lease was decreed, among other things, to be sold for the payment of the testator's legacies; and that at the time of the death of the testator there was 125*l.* due for one year and one quarter's rent of the said messuage and lands; that after the testator's death there was 100*l.* more due for a year's rent; and that the said *Dallow* the tenant soon after became insolvent, and unable to pay the said arrears of rent, being 225*l.*; upon which the defendant *Marshall*, and his

wife, without consulting the plaintiff, released to the said *Dallow*, not only the said arrears of rent amounting to 225*l.*, but also gave him 20*l.* out of his [*Marshall's*] own pocket, upon condition that the tenant should forthwith quit the possession of the said messuage, which accordingly he did; and thereupon the leasehold premises were sold for the purposes in the decree. But the Master charged the defendant with the said arrears of rent of 225*l.*, it being the voluntary act of the defendant to release them; but allowed the defendant the 20*l.* which he had paid out of his own pocket. Upon which the defendant excepted to that part of the Master's report.

And for the plaintiff it was objected, that whenever an executor, administrator, guardian, or trustee, will of his own accord release a debt, this being his voluntary act, he shall answer for it; and the rather in the present case, for that [383] the defendant, who made the release, ought to have first asked the plaintiff for her consent to the making of the release; or, in case of obstinacy in her, to have applied to the court for their directions in the matter; and though it might be true, that the tenant was at that time insolvent, yet hereafter he might become solvent, and able to pay the rent; whereas, in case the tenant should ever become capable of paying the rent, this release would extinguish it; and as to the gaining of the possession, that was of no great value, there being a proviso in the lease for the landlord's re-entry in case of non-payment of the rent; so that the tenant's giving up the possession was no more, than what the landlord could recover by law, without the consent of the tenant.

Lord Chancellor contra. The defendants are decreed to account for all the personal estate that came to their hands, or to their use; but these arrears of rent were neither received by them, nor did they come to their use; and the tenant becoming insolvent, the estate has not suffered by this release, in regard, if the arrears of rent had not been released, the defendant could never have gotten them, when the tenant was unable to pay them; and if the testator's estate has not suffered on account of this release, there is no reason it should gain thereby. The defendant seems to have done nothing but what was prudent. A vexatious tenant may put his landlord to great trouble and delay by a wrongful detainer of the possession, and by damaging the estate in the

BLUE v. MARSHALL.

mean time; and may force the landlord to ejectments, writs of error, and bills in equity, by means of which he may lose not only his accruing rent, but his costs of suit; so that this release seems to be for the benefit of the testator's estate.

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Neither will I make a difference between the 20*l.* allowed by the defendant, and the release of the arrears of rent; for both were but one entire consideration for the tenant's quitting the possession; and by the same reason that the defendant has been allowed the one, he ought to be allowed the other. It is moreover a strong presumptive argument, that the defendant has acted fairly, and according to what he thought was for the advantage of the estate; since the other defendant, his wife, is to have the benefit of the 200*l.* (now sued for) after the widow's death, for the advancement of her and her children, and consequently is a sufferer by the tenant's becoming insolvent, as well as the widow.

Therefore allow the exception, and let not the defendant be charged with these arrears of rent.

Case 106.

2 Bea. 516:

ASHTON *v.* ASHTON.

On an Appeal from the Decree at the Rolls.

Lord Chancellor TALBOT.

Ca. temp. Tal. 152.
2 Eq. Ca. Ab. 558. pl. 28.
One devises the sum of 6000*l.* South-sea stock to J. S., and the testator has but 5360*l.*; no more than the 5360*l.* shall pass; and the rest of the testator's personal estate not be obliged to make it up 6000*l.* But it might be otherwise, if the testator had no stock at all.

THE case was thus: The testator had no more than 5360*l.* *South-sea* annuity stock, but by his will bequeathed the sum of 6000*l.* *South-sea* annuity stock to trustees, in trust to sell and invest in land to be settled on his nephew, the plaintiff for life, remainder over; and until the purchase should be made, the nephew to have the interest or dividend of the *South-sea* annuity stock for his life. The question was, whether the rest of the testator's personal * estate, which was very considerable, should be liable to make it up 6000*l.*, or whether no more passed by the will than the stock

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which the testator was possessed of at the time of making his will, and at his death?

The Master of the Rolls had decreed, that no more passed by the will than the 5360*l.* *South-sea* annuity stock, which the testator was possessed of. And now the cause coming on before the Lord Chancellor upon an appeal,—

It was argued for the plaintiff, that the deficiency ought to be made up out of the rest of the testator's personal estate; for that here was plainly a mistake in the testator, who intended the full legacy of 6000*l.*; that this was a specific legacy, which in law is favoured, and allowed a preference before others; that if the testator had at that time no stock at all, the whole legacy must have been made good out of the rest of the personal estate; and there seemed to be still more reason to supply the small deficiency; and it was compared by Mr. *Fazakerly* to the case in 2 *Leon.* of a man's devising his land in such a place, where he happened to have no land, but had tithes and it was held, that the tithes should pass.

But the Lord Chancellor affirmed the decree at the Rolls, observing, *first*, that though specific legacies have in some respects the advantage of those that are pecuniary, so as to be paid *in toto*, and not in average, on a deficiency of assets; yet, in other respects, they are distinguished to their (*a*) disadvantage from pecuniary legacies; as suppose they shall have been lost or aliened by the testator in his lifetime, they must then fail *in toto*.

Specific legacies, as in some respects they have the advantage, so in others they have the disadvantage of pecuniary ones.

(*a*) See vol. 1. 540. Hinton *v.* Pinke.

* *Secondly*, That where one devises a debt due to him, after which the debtor, uncalled upon, pays in the debt to the testator in his lifetime; this would certainly be no ademption of the legacy; here being no act done by the testator himself, but by the debtor, who might oblige the other to receive his money; and that so indeed he thought it would be, where the testator himself should call for the debt, seeing this might be done from an apprehension of such debt being in danger, and with a design to secure it, and being personal estate, and not diminished by remaining in the testator's coffer, instead of the hands of the debtor, it may well pass by the will.(1)

Where the testator devises a debt, and afterwards receives it, or even calls it in, in neither case is this an ademption of the legacy.

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But that, *thirdly*, in the principal case it did not appear

(1) Vide *Earl of Thomond* v. *Earl of Suffolk*, ante, 1 vol. 465. *Rider* v. *Wager*, ante, 2 vol. 330.

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the testator ever had more than the 5360*l.* *South-sea* annuity stock; and regularly speaking, without some plain words manifesting an intention to that purpose, no property shall pass, but what the testator was himself possessed of; that it is more natural to suppose a man intends to give what he has than what he has not; that in the case cited from *Leonard's Reports*, the tithes were held to pass, as these are issuing out of the land, and are part of the profits thereof; but principally, because the testator having no lands there, the (*a*) whole must otherwise have been rejected; and so possibly in the principal case, had the testator, when he made his will, &c. had no stock at all, the whole might have been to be made good out of the rest of the personal estate; whereas the stock he was then possessed of does in some measure satisfy the will.(1)

One has no land in A. but has tithes there, and devises all his land in A.; the tithes, as they are issuing out of the land, and part of the profits thereof, shall pass.

(*a*) See Day *v.* Trig, vol. 1. 286.

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(1) Reg. Lib. A. 1734. fol. 151. 1735. fol. 112. Et vide *Hinton* v. *Pinke*, ante, 1 vol. 540. *Partridge* v. *Partridge*, Ca. temp. Talb. 226. *Purse* v. *Snaplin*, 1 Atk. 414. *Jeffreys* v. *Jeffreys*, 3 Atk. 120. *Avelyn* v. *Ward*, 1 Vez. 424. *Sleech* v. *Thorington*, 2 Vez. 562. *Drinkwater* v. *Falconer*, 2 Vez. 623. *Bishop of Peterborough* v. *Mortlock*, 1 Bro. C. C. 565. *Ashburner* v. *Macguire*, 2 Bro. C. C. 108.(*z*)

(*z*) In *Wilson* v. *Brownsmith*, 9 Ves. 180. the Master of the Rolls says the principal case has been overruled: but in *Simmons* v. *Vallance*, 4 Bro. C. C. 348. it is upheld upon the direction to the trustees to sell the stock and invest the proceeds in land; and see *Mann* v. *Copland*, 2 Madd. 223.

Case 107.

GOODWYN *v.* LISTER.

[387] Lord Chancellor TALBOT.

THOMAS GOODWYN, the plaintiff's father, entered into articles with *Thomas Poole*, dated the 17th of *March*, 1729, for the purchase of a tenement called *Hardings-Millwood*, by which *Poole* covenanted for himself and his heirs to convey the said tenement before the 21st of *March* then next ensuing; and in consideration thereof, *Goodwyn* covenanted to pay 705*l.*, the purchase money.

2 Eq. Ca. Ab. 521. pl. 7. The statute enabling infant trustees to convey, extends only to plain and express trusts, not to such as are implied, or constructive only.

Poole died in the *December* following, before any conveyance was made in pursuance of the articles: upon whose death the premises in question descended to *Hannah* the wife of *Thomas Lister*, and *Elizabeth*, the wife of *William Ford*, (two of the daughters of the said *Poole*) and to *Richard Bagnal*, an infant, the eldest son of *Mary Bagnal*, the third daughter of the said *Poole*. *Goodwyn* the contracting purchaser died; and the plaintiff, as his eldest son, and heir at law, brought this bill to have the estate conveyed according to the directions of his father's will, upon payment of the purchase-money by the executors therein named. To this bill amicable answers were put in, submitting to the direction of the court.

The only question was, whether the two daughters of *Thomas Poole*, and *Richard Bagnal*, the heir at law of the third daughter, were trustees within the act of 7 *Annæ, cap.* 19. intituled, "An act to enable infants, who were seised or "possessed of estates in fee in trust, or by way of mortgage, "to make conveyances of such estates;" for if they were within that statute, then they might be decreed to convey, though *Richard Bagnal* was an infant: but if the articles did not raise a trust within that statute, in such case the plaintiff could only have a decree, that the two married daughters, who were of age, should convey immediately what was vested in them by descent; and that he should hold the share of the infant till he came of age, with liberty for the infant then to shew cause, why he should not convey such share according to the articles.

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Lord Chancellor. There can be no doubt with regard to express trusts by deed, but that an infant, being a mere trustee, may be ordered to convey; and there is no inconvenience in directing an infant to part with an estate, which is of no benefit to him. But the present question is, whether this, being a trust *only by construction of equity*, be within the act; and here I incline strongly to the negative. Indeed, with regard to its being a trust, there can be no doubt but that it is so; for whenever one man enters into articles for the sale of an estate, and agrees to convey it to another, in consideration of a sum of money engaged to be paid by that other person; from the time the articles ought to be performed, the one becomes entitled to the estate, and the other a creditor for the purchase-money; and so there can be no difficulty in decreeing a performance of the articles. But I

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cannot think constructive trusts to have been within the view of this act of parliament, which does not make provision for infants to convey in pursuance of the decrees of this court, but only gives power to make orders in a summary way, in cases that are originally plain, and uncontroverted by the parties.

Wherefore, this case seeming to his Lordship to be left to the common law, as that stood before the making of the act,

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it was decreed, that the two daughters should convey immediately, and that a day should be given for the infant *Bagnal* to shew cause within six months after he should come of age, with liberty to the plaintiff to apply to the court, in case any precedents could be found, where such constructive trusts had been held to be within that statute. See vol. 2. 549. *Ex parte Vernon.* [A]

[A] *A.* owed several debts, and by his will devised lands in fee to an infant, charged with all his debts and legacies: the personal estate was greatly deficient; and the chief end of the bill was, that the infant might be enabled to sell so much of the real estate, as would suffice for the payment of the debts and legacies. It was admitted the infant could not (as yet) be said to be a bare trustee for the creditors, &c. since he had the surplus (the greatest part of the estate) to his own use: but it was insisted, that when the Master should have ascertained the debts, set out what were the proper lands to be sold, and what would be sufficient for the payment of the debts and legacies, then the infant as to these lands would be a bare trustee; and as this act was remedial, and made to supply what was before a defect in the law, it was but reasonable to enlarge it by the most favourable construction.

Cur': It is very true, this is a remedial law: but still the principal case is not within it, in regard the act only extends to cases where the infant is a bare trustee originally, and at the death of the testator, not where he is made such by several subsequent acts done by a Master, in setting forth what debts and legacies there are, how far the personal estate is deficient, and what part of the land is fit to be sold; which report will consist of several matters, which the infant, when of age, may be advised to controvert; and therefore this will not render the infant a trustee for these lands within the act. For which reason the court refused to make a decree, that the infant should join in the sale, but directed the Master to take an account of the debts and legacies, and of the personal estate, and what deficiency there was therein, as also what part of the real estate was fittest to be sold; the infant to convey when of age, unless he should shew cause to the contrary within six months after he should come of age. At the Rolls, *Anonymous*, *Trinity Vacation*, 1730. (*z*)

See 4 *Geo.* 2. *cap.* 10. whereby idiots, lunatics, &c. or their committees, by the direction of the Lord Chancellor, may assign over their trusts or mortgages,

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(*z*) See *Attorney-General* v. *Pomfret*, 2 Cox, 221. *Ex parte Bellamy*, 2 Cox, 422. ——— v. *Handcock*, 17 Ves. 383. *Ex parte Beddam*, 1 Rose, 310. *Ex parte Tutin*, 3 V. & B. 149. *Ex parte Carter*, 5 Mad. 81. And the cases cited *Ex parte Vernon*, ante, 2 vol. 549 n.

and be ordered to make such conveyances, in like manner as trustees or mortgagees of sane memory. (*y*)

(*y*) Under this statute a trustee could not be ordered to convey, unless he had been found a lunatic under a commission. *Ex parte Gillam*, 2 Ves. Jun. 587. But the 6 G. 4. c. 74. which consolidates this statute, the 7 Anne, c. 19. supra, and several other statutes *in pari materia*, renders a commission unnecessary. The lunatic must be without interest, and have no duty to perform. *Ex parte Tutin*, ub. sup. *Ex parte Currie*, 1 J. & W. 642.

DUKE OF SOMERSET *v.* COOKSON.

Case 108.
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Lord Chancellor Talbot.

2 Eq. Ca. Ab. 164. pl. 28. A bill lies to compel the delivery of an altar-piece or other curiosity in specie.

The Duke of *Somerset*, as lord of the manor of *Corbridge*, in *Northumberland*, (part of the estate of the *Piercys* late Earls of *Northumberland*) was entitled to an old altar-piece made of silver, remarkable for a *Greek* inscription and dedication to *Hercules*. His Grace became entitled to it as treasure trove within his said manor. This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at *Newcastle*, but who had notice of the Duke's claim thereto. The Duke brought a bill in equity to compel the delivery of this altar-piece in *specie*, undefaced.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of *trover* or *detinue*, and ought not to bring his bill in equity; that it was true, for writings savouring of the realty a bill would lie, but not for any thing (1) merely personal; any more than it would for a horse or a cow. So, a bill might lie for an heir-loom; as in the case of *Pusey* v. *Pusey*, 1 *Vern.* 273. And though in *trover* the plaintiff could have only damages, yet in *detinue* the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of *trover* would be turned into bills in chancery.

(1) Vide *Cud* v. *Rutter*, ante, 1 vol. 570. *Colt* v. *Netterville*, ante, 2 vol. 304.(*z*)

(*z*) *Fells* v. *Read*, 3 Ves. 70. *Lloyd* v. *Loaring*, 6 Ves. 777. *Nutbrown* v. *Thornton*, 10 Ves. 159. *Lowther* v. *Lowther*, 13 Ves. 95. *Earl of Macclesfield* v. *Davis*, 3 V. & B. 18.

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On the other side it was urged, that the thing here sued for, was matter of curiosity and antiquity; and though at law only the intrinsic value is to be recovered, yet it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity, or matter of antiquity, or ornament, *nolens volens*. Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out, or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer; that in itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again in specie; and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was over-ruled accordingly.

Case 109.

LAW *v.* LAW.

Lord Chancellor TALBOT.

Ca. temp. Talb. 140.
2 Eq. Ca. Ab. 187. pl. 10.
A. by his interest with the commissioners of excise gets an office in that branch of the revenue for B., who in consideration thereof gives a bond to A. to pay him 10*l.* per annum as long as B. enjoys the place; equity will relieve against the bond.

A., by the interest which he had with the commissioners of excise, procured for his brother *B.* a supervisor's place in that office; and in consideration thereof, *B.* gave a bond for the payment of 10*l.* *per annum* to *A.* by half-yearly payments, as long as *B.* should continue in the office. *B.* died, having for some years omitted the payment of this annual sum of 10*l.*, whereupon *A.* sued the bond against the widow and executrix of *B.* who at law pleaded a sham plea of payment, and now brought this bill to be relieved against the bond.

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For the defendant it was objected, that the bond was admitted to be good at law by the plaintiff's not being advised to plead the statute of 5 & 6 Edw. 6. against the sale of offices; neither truly in this case could the act be pleaded,

being made long before the excise became a branch of the revenue; that the law being with the defendant, it would be hard to take the benefit thereof from him, especially when he was not plaintiff in equity, prayed no aid of this court, and had been guilty of no fraud; that though the bond in question had on a (*a*) former occasion been called a place-brocage bond, and represented as equally mischievous with a marriage-brocage bond, yet it could with no reason or justice be resembled to a marriage-brocage bond, which had indeed at length, in the case of *Potter* v. *Hall*, [B] (though after great litigation and difference in opinion) been condemned in equity, with a view to obviate a growing mischief, occasioned by servants and other mean persons taking these bonds for procuring marriages into great families, which produced very unequal matches, to the unspeakable uneasiness and discomfort of friends on account of such alliances: whereas the present case could be attended with no such inconveniencies; for if the officer who gave the bond should be thereby induced to act corruptly, or be guilty of extortion, he would be punishable in another manner, by indictment for such corruption or extortion, and if found guilty, would forfeit his place: that it could be no objection that the whole salary or profits belonging to an office ought to be received by him that executed it, for this was frequently otherwise, and yet tolerated both in law and equity. Nay, in some of the greatest offices of the courts in *Westminster-hall*, the deputy who executed the office had commonly but a scanty allowance, the greatest part of the profits going to the principal, who underwent none of the trouble.

(*a*) On a motion for an injunction which the court granted in Jan. 1733.

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But by the Lord Chancellor. Bonds and engagements of this nature are highly to be discouraged. Merit, industry, and fidelity, ought to recommend persons to these places, and not interest with the commissioners, who, it is to be presumed, had they known from what motive the plaintiff at law applied to them on behalf of his brother, would have rejected him. The officer's giving money to a friend of the commissioners for his interest is altogether as bad as giving money, or a bond for money, to the commissioners themselves, which undoubtedly would have been relieved against.

[B] This was a bond for assisting in promoting a marriage, which afterwards took effect. The cause was heard first before Sir *John Trevor*, Master of the Rolls, who relieved against the bond; afterwards the Lord *Sommers* reversed the decree at the Rolls, but the Lords reversed the decree of reversal. *Cases in Parl.* 76. See also the case of *Roberts* v. *Roberts*, ante, 76.

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It is a fraud on the public, and would open a door for the sale of offices relating to the revenue. The taking away from the officer what the commissioners and the treasury think to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity, must needs be of the most pernicious consequence, and induce him to make it up by some unlawful means, such as corruption and extortion. And though the excise was no part of the revenue at the time of making the statute of 5 and 6 Edw. 6., yet there may be good ground to construe it within the [C] reason and
[394] mischief of that law, which is rather a remedial than a penal one.

But supposing it to be a good bond at law, so are all marriage-brocage bonds; which yet are justly condemned in equity, as introductive of infinite mischief; and their having been much litigated and contested fortifies the opinion that prevailed at last; for it shews what was the sense of the supreme court of judicature, after the inconveniencies of such bonds had been fully weighed and experienced.

Wherefore since engagements of this kind are like to occasion corruption and extortion in offices, by having the profits of places separated from the places themselves, let the bond be delivered up, and a perpetual injunction awarded thereon; and though this be a new case let the defendant pay costs. (1)

[C] It is no new thing, but usual, that an interest raised by a subsequent statute should be under the same remedy and advantage as an interest existing before. Thus, at common law, no acceptance of a collateral recompence could bar a wife of her dower. But the statute of 27 *H.* 8. made a jointure to be a bar, which at that time extended only to a jointure made by act executed in the husband's life-time. Afterwards the 32 *H.* 8. enabling a man to devise his lands, it was held, that if a man were to devise lands to his wife in satisfaction of her dower, and she should accept them, this would be a bar within 27 *H.* 8., 4 *Co.* 4. *a. b.* because it is within the same equity and reason; and the diversity is in the manner only, not in the thing. So Exchequer Bills, though created and made valuable by a statute subsequent to that of 12 *Car.* 2. *cap.* 35, for erecting the post-office, yet are portable within the intent of the said act of 12 *Car.* 2.; and, on a letter in which such bills were inclosed being lost out of the office, the Postmasters were held chargeable. From the Lord Ch. Just. *Holt*'s argument in the case of *Lane* v. *Cotton and Frankland*, in the Reporter's manuscript. See also *Salk.* 17. And it is observable, that though the other three Judges of *B. R.* differing in opinion with the Chief Justice, judgment was given in that case for the defendants, yet on a writ of error being brought in the Exchequer-chamber, the defendants are said to have made satisfaction to the plaintiff, which put an end to all further proceedings.

(1) Reg. Lib. B. 1735. fol. 86. Et vide *Bellamy* v. *Burrow*, Ca. temp.

Tal. 97. *Purdy* v. *Stacy*, 5 Burr. 2698. *Harrington* v. *Du Chatel*, 1 Bro. C. C. 124. (*z*) *Debenham* v. *Ox*, 1 Vez. 276. *Morris* v. *M^c Cullock*, Amb. 432. (*y*) *Garforth* v. *Fearon*, 1 H. Bl. 327. *Parson* v. *Thompson*, 1 H. Bl. 322. (*x*)

(*z*) S. C. 2 Dick. 581.
(*y*) S. C. 2 Eden, 190.
(*x*) *Hartwell* v. *Hartwell*, 4 Ves. 811. *Blachford* v. *Preston*, 8 T. R. 89. *Thomson* v. *Thomson*, 7 Ves. 470. *Osborne* v. *Williams*, 18 Ves. 379.; and see *Richardson* v. *Mellish*, 2 Bing. 229.

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SIR WILLIAM HUMPHREYS *v.* his Son ORLANDO HUMPHREYS.

Case 110.

Lord Chancellor TALBOT.

A. brings a bill against B. to recover divers sums on an account, and also 10,000l. on a stale bond of above twenty years standing. The defendant demurs as to what related to the bond, for that the plaintiff might sue at law. The demurrer being allowed, the obligee in the bond sues the bond at law and gets a verdict, after which the defendant brings his bill to be relieved against the bond, as having been satisfied; the court ordered an injunction, for that there was reason to grant relief in equity, though the defendant had demurred to the bill brought on the bond.

MR. *Humphreys* had brought a bill against his father Sir *William Humphreys* to recover divers sums of money from the father, and *inter al'* a bond of 20,000*l.* entered into in 1704, for the payment of 10,000*l.* and interest at the end of the year.

The defendant demurred as to that part of the bill that prayed relief on the bond, or to recover the money due thereon; for that the plaintiff had a remedy for the same at law; the bond appearing to be in his custody, and taken in his own name. This demurrer was argued and allowed. Afterwards the son, Mr. *Humphreys*, brought an action at law on this bond; and on *solvit ad diem* pleaded, obtained a verdict, (*viz.*) that the money secured by the bond was not paid.

Upon this Sir *William* brought his bill, setting forth, that this bond for 10,000*l.* was entered into without any consideration, and intended only to be in force until some settlement should be made on Mr. *Humphreys* by his father, who, upon his son's marriage in 1707, had given him 10,000*l.*, and covenanted to give him 10,000*l.* more; and that a purchase in *Essex* of 1000*l. per annum* had been settled on the

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son in possession; also that the bond was afterwards thrown aside amongst useless and neglected papers as a thing of no value, and had been satisfied by stocks of the father that had been transferred to the son, or to his order, specifying the particulars.

Mr. *Humphreys*, to such part of the bill as prayed relief against the bond, pleaded the verdict and the former demurrer put in by Sir *William* and allowed. And it was argued, that this was properly triable at law; and after that the court, and even Sir *William*, had declared themselves of that opinion: and the defendant having accordingly been at law and recovered there, the father, Sir *William*, must not now be admitted to say it is proper in equity, and not at law; for that would be going backward and forward, and dealing ill with the court; and was (as Mr. *Strange* observed) a *departure*, which is no more to be endured in equity, than it is at law.

After a plea put in there can be no motion for an injunction, till the plea is argued.

Upon a motion for an injunction to stay proceedings on the bond, the court said, that after a plea put in, there can be no motion for an injunction. (*z*) But at the instance of the plaintiff, it was ordered that the plea should come on the next day to be argued among the exceptions, with leave, that if the plea should be over-ruled, then the plaintiff Sir *William Humphreys* might move at the same time for an injunction.

Accordingly the plea coming on to be argued, after hearing counsel, the Lord Chancellor declared, that this bond being a stale one, of about thirty years' standing, and the money due thereon not having been demanded for very many years, and the suit on the bond on the son's part being improper in equity, Sir *William Humphreys* might reasonably expect *primâ facie* to have met with success at law, it being a rule, that after twenty years and no interest paid during that time, a bond shall be presumed to be satisfied (*y*) unless something appears [D] to answer that length of

[D] The producing a receipt for interest within twenty years, indorsed on a bond by the obligee, (though the time when such receipt was written and signed did not appear otherwise than by the indorsement itself) has been held sufficient to take off the presumption of payment. See the case of *The Lord Barrington*

(*z*) Nor after a demurrer filed, *Cousins* v. *Smith*, 13 Ves. 164.

(*y*) *Anon.* 6 Mod. 22. *Winchelsea* *Causes*, 4 Burr. 1963. *Oswald* v. *Legh*, 1 T. R. 270.

time; so that the plaintiff Sir *William Humphreys* had reason to insist by way of demurrer, that this was proper at law; where if it had gone for him, it had cut every thing short, and made an end of the demand: but though this matter be now found against the obligor, it is nevertheless hard to say, that he shall be barred of any equity he may have against the bond. As suppose the same were really intended only to secure a provision for the son, until a settlement should be made, which settlement has accordingly been made; or suppose the bond has in fact been satisfied by a transfer of the father's stocks, or any other way, surely there can be no doubt but that the obligor, under these circumstances, ought to be relieved; consequently, it is no bar to say to the father, "you "alleged this bond was properly triable at law, which has "been so done, and therefore you can have no relief in "equity." Now if this be so, then the answer which should support the plea being general, and not answering the particular charges in the bill, the plea will be insufficient, and must be over-ruled; and the plaintiff having by the order liberty to apply for the injunction, it is a motion of course, and must be granted. But this controversy being between an aged father and an only son, was, the court said, fit to be agreed; and thereupon it was recommended to Mr. *Attorney-General* on the one side, and Mr. *Verney* on the other, to endeavour to compromise the difference, and end the matter amicably.

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v. *Searle*, in Parliament, *Feb.* 1730, upon a writ of error from the Exchequer Chamber. 3 Bro. P. C. 535. (*x*)

(*x*) S. C. 2 Str. 826. 2 Lord Raym. 1370.; and see Lord Hardwicke's observations in *Glynn* v. *The Bank of England*, 2 Vez. Sen. 43.

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ROBINSON ET AL' *v.* TONGE, DUNN, ET AL'.

Case 111.

Upon the Master's special Report.

Lord Chancellor TALBOT.

A BILL was brought by the creditors of *Tonge* against the defendant *Dunn*, who was his administrator, and against

2 Eq. Ca. Ab. 259. pl. 16. 454. pl. 14.

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others, for the recovery of debts due to the plaintiffs on bond from the intestate. And on hearing the cause, the court made the usual decree for the defendant to account, and the Master to be at liberty to state any thing specially.

The Master stated, that *Tonge* the intestate died indebted by some judgments that were recovered against him in his lifetime; and his death happening in the vacation, several of his creditors, who had warrants of attorney for judgments, entered their judgments which related to the first day of the preceding term, and consequently to the intestate's lifetime; though in fact such judgments were not signed till after the intestate's death; and likewise, that the intestate died indebted to several by bond; and that the defendant *Dunn* having been bound as surety only for the intestate in some bonds and judgments, took out administration to him, being advised, that he might thereby pay off those debts for which he himself was bound, as surety for the intestate: that *Dunn* the administrator paid off two judgments entered in the intestate's lifetime, amounting to 300*l.*, and paid off some judgments entered in the vacation following after the intestate's death, but which by relation (*ut supra*) had a retrospect to the first day of the term which was in the intestate's lifetime, though not actually signed till after his

[399] death; and that the said administrator paid some debts by bond, and disbursed and advanced so much money, as to have over-paid 100*l.* beyond what he had received; and that there were no more personal assets left, nor any real assets but an advowson in fee, which had descended to the heir and which on an appeal to the House of Lords, had been adjudged to be assets to pay debts, where the heir was bound and which advowson had been since by order of the court sold, and the money paid into the bank.

On this case thus stated the Lord Chancellor gave his opinion:

First, That as to the judgments recovered against the intestate, and entered in his lifetime, they must undoubtedly be preferred. Also,

Where by the statute of frauds it is said, that judgments shall not bind lands, but from the signing, this relates only to purchases, and therefore, as between creditors, a judgment entered in the vacation relates to the first day of the preceding term.

Secondly, That with regard to the judgments on warrant of attorney entered after the intestate's death, as these related to the first day of the term, when the intestate was alive, th

same were good judgments from that time(z); for the statute of frauds, which enacts, that no judgment shall bind land, but from the signing, concerns only purchasers, and not creditors [E]; so that as to creditors this remains as it was at common law. But,

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Thirdly, The question was, what remedy the administrator should have, with respect to the money which he had paid out of his pocket beyond the personal assets? And here it was represented to be very hard, if he should lose any part of that; for which reason it was said, that as to the judgments, and more especially those that had been obtained in the intestate's lifetime, and which the administrator had paid, he ought to stand in their place; and as these judgment creditors might have come on the real assets for their whole debts, so should the administrator that paid them.

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Lord Chancellor. As to the judgments which the administrator has paid, both those which were entered in the testator's lifetime, and also those entered in the vacation after his death, so far he has duly administered: but when he went further, and paid bonds beyond the assets, he must stand in the place of those bonds, and there being no personal assets, must be content to come in *pro rata* only with

A. owes money by several judgments and bonds, and dies intestate. His administrator pays the judgments and some of the bonds, and pays more than the personal estate comes to; what the administrator paid on the judgments must be allowed him: but as to what he paid on the bonds, he must come in pro rata with other bond creditors out of the real assets.

[E] The late Earl of *Winchelsea* died seised of some lands in fee, and considerably indebted by judgment and simple contract; and after the death of the said Earl, and before the essoin day of the next following term, many of the judgment creditors delivered *fieri facias*'s to the sheriff, and took the goods and furniture in execution; whereupon the simple contract creditors petitioned, (for it did not come before the court upon a bill) that the judgment creditors might be paid out of the land; or at least, that as to so much as the judgment creditors had, by taking it from the personal estate, exhausted the same, they (the simple contract creditors) might stand in their place, and be paid out of the land.

Sed per cur'. This rule of equity is very just, but not applicable to the present case: here, the judgment creditors having lodged their writs of execution with the sheriff in the same vacation that the party died, it relates to the *teste* of the writ, as to all but purchasers; and consequently, by relation, the personal estate of which the simple contract creditors would avail themselves, as being in the possession of the Earl at his death, was not so, being evicted from him in his lifetime by the execution; and therefore the simple contract creditors seem to be without remedy, as to such of the assets as have been seized by these executions. *Finch* v. *The Earl of Winchelsea*, *Hil. Vacation*, 1719. by the Lord *Parker*. *Sed quære.*

(z) *Heapy* v. *Parris*, 6 T. R. 368. *Waghorne* v. *Langmead*, 1 B. & P. 571. *Bragner* v. *Langmead*, 7 T. R. 20.

ROBINSON *v.* TONGE. [401]

the other bond creditors, for a satisfaction out of the money arising by sale of the advowson, which is real assets.

But then it was objected by the Solicitor-General, that the advowson was not liable to the demands on the intestate's estate; for that at common law no real estate could be extended, and that an advowson is not extendible on an *elegit;* that the statute (*a*) only made *medietatem terræ* liable to an extent; also that nothing can be extended on an *elegit*, but what the jury may put an estimate on the (*b*) yearly value thereof; now no yearly value can be put upon an advowson, much less upon the moiety of an advowson; and if the case in 1 *Inst.* 374. *b.* be law, that an advowson in fee is assets, yet it may not be extendible on an *elegit.*

(*a*) West. 2. c. 18.

(*b*) 3 Cro. 359. by Anderson, Ch. J.

An advowson descending to an heir is real assets, and (as it seems) extendible on an elegit.

Lord Chancellor. It seems hard, to maintain that things incorporeal, or lying in grant, are not extendible on an *elegit.* However, the question here is, not whether an advowson be extendible, but whether it be assets, which has already received a determination in the House (1) of Lords; and indeed as it may be sold, and comes to the heir by descent, it is reasonable it should be assets.

Memorandum. In this case it was insisted, that the administrator could not pay a bond debt after a bill in equity brought against him by another bond creditor and notice, the said bill being in nature of an action at law; in which case such administrator would not be permitted to pay a bond creditor without having given him judgment; which the court seemed without difficulty to allow.[F]

[F] Nevertheless this point does not appear to have been fully settled till lately. In the case of *Darston* v. *The Earl of Orford*, *Hil.* 1701,(*y*) where *A.* and *B.* were both creditors by specialty of *J. S.* who died, and left an executor, against whom *A.* brought a bill in equity for a discovery of assets, and to be paid his debt, and pending such suit, the executor voluntarily, and without suit, paid *B.*'s debt: upon an account decreed on *A.*'s bill against the executor, the latter craved an allowance of this payment; and it was decreed by the Lord Keeper *Wright*, that the executor should not have an allowance thereof; seeing, that before payment made, a bill in equity was brought by *A.* of which the executor had notice; and a bill in equity is equivalent to an action at law, pending which action an executor cannot make a voluntary payment of any debt. From this decree an appeal was afterwards brought in the House of Lords, where the decree was reversed; and the reason on which the Lords principally grounded

(1) 3 Bro. P. C. 556.

(*y*) Prec. in Ch. 188. and see and *Waring* v. *Danvers*, *ante*, 1 vol. *Maltby* v. *Russell*, 2 S. & S. 227. 295.

their decree of reversal was, for that as the debts were of equal degree, and since a decree of the court of Chancery cannot be pleaded at law to an action brought against an executor upon another debt of equal nature; therefore, such executor might justify the payment of another debt of equal nature; even pending a bill in equity. From a note communicated to the reporter by Mr. *Dodd*, (afterwards Lord Chief Baron of the Exchequer) who was of counsel on the appeal. It is however now become the established doctrine, that a decree of the court of Chancery is equal to a judgment in a court of law(*x*); and where an executrix of *A.* who was greatly indebted to divers persons in debts of different natures, being sued in Chancery by some of them, appeared and answered immediately, admitting their demands, (some of the plaintiffs being her own daughters) and other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of Chancery, being for a just debt, and having a real priority in point of time, not by fiction and relation to the first day of term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings against her at law stayed by injunction. *Morrice* v. *The Bank of England.*(*w*) Decreed first at the Rolls by Sir *Joseph Jekyll*, in *August*, 1735, which was affirmed by the Lord *Talbot*, in *November*, 1736, and his Lordship's decree affirmed in Parliament in *May*, 1737.(1)

(1) Ca. temp. Talb. 217. and 4 Bro. P. C. 287.

(*x*) See *Bligh* v. *The Earl of Darnley*, ante, 2 vol. 621.

(*w*) In this case a bill for an injunction was filed by the executrix against the creditor suing at law; and so in *Martin* v. *Martin*, 1 Vez. Sen. 211. *Douglas* v. *Clay*, 1 Dick. 393. *Kenyon* v. *Worthington*, 2 Dick. 668. *Brooks* v. *Reynolds*, 1 Bro. C. C. 183. *Goate* v. *Fryer*, 3 Bro. C. C. 23. and 2 Cox, 201.: but an injunction to restrain a creditor suing at law can now be obtained on motion in the suit wherein the decree to account has been made; *Paxton* v. *Douglas*, 8 Ves. 520. *Perry* v. *Phelips*, 10 Ves. 34. *Jackson* v. *Leaf*, 1 J. & W. 231.; though the court will require the executor to make a statement on oath of the amount of assets in his hands. *Paxton* v. *Douglas*, ub. sup. *Gilpin* v. *Lady Southampton*, 18 Ves. 469. And the injunction can be obtained by either plaintiff or defendant in equity; *Dyer* v. *Kearsley*, 2 Mer. 482. n. and see *Clarke* v. *The Earl of Ormonde*, Jacob, 122.; and if, after notice of the decree, a creditor proceeds at law, he will not be allowed his costs at law subsequent to notice, nor the costs of application for injunction. *Curre* v. *Bowyer*, 3 Mad. 456. But a court of equity will not enjoin a creditor from proceeding at law, where the executor has pleaded such a plea as may entitle the creditor to a judgment *de bonis propriis*. *Terrewest* v. *Featherby*, 2 Mer. 480. *Clarke* v. *The Earl of Ormonde*, ub. sup.; and see as to such pleas, *Fielden* v. *Fielden*, 1 S. & S. 255. *Lord* v. *Wormleighton*, Jacob, 148. and note to *Hancocke* v. *Prowd*, 1 Saund. 336.

Case 112.

CLAVERING *v.* WESTLEY ET AL'.

Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 224. pl. 9. Lease of a coal mine to A., reserving a rent; A. the lessee, declares himself a trustee for five persons, to each a fifth; the five partners enter upon, work, and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent; the cestuy que trusts not liable, but for the time during which they took the profits.

THE plaintiff seised in fee of a coal-mine, made a lease thereof for twenty-one years (reserving a rent) to *A.* who declared a trust of this lease, (*viz.*) that he was a trustee, as to the coal mine, for five several persons, to each of them one fifth.

*The five partners entered upon, worked the mine, and took the benefit of it: but some time after, the lessee becoming insolvent, and the mine unprofitable, it was flung up and abandoned by the several partners; upon which the lessor brought his bill against the lessee and the several partners in order to compel them to pay the rent in arrear, and also the accruing rent; insisting, that though the lease was made to a trustee, yet it being declared by him to be in trust for these several persons, as tenants in common, it was the same thing as if it had been made to them originally, or as if the lessee had assigned it to them; in either of which cases the *cestuy que trusts* would have been liable for the rent, and to the covenants in the lease, until such time as they should have assigned it over. Besides, as these *cestuy que trusts,* while it continued a beneficial lease, were to have the profits, so on the other hand it was reasonable they should abide by the loss of it. *Qui sentit commodum, sentire debet et onus.*

[*403]

3. Rea. 15.

But by the Master of the Rolls. The action at law lies against the lessee only, by the landlord, who giving credit entirely to such lessee, is debarred of his remedy against any other. And there seems to be still less reason to charge the *cestuy que trusts* for the future accruing rents, since, as these are no otherwise chargeable than as assignees, they are at liberty, by assigning over their lease, to get rid of it, and thereby to determine that privity of estate, in respect of which only (1) it can be pretended that they are liable. Wherefore, seeing in the principal case the lessor has no remedy at law against any but his lessee, upon the credit of whom, and of whose covenants, he has let the mine; and

(1) *Chancellor* v. *Poole,* Doug. 765.(z)

(z) *Buckland* v. *Hall,* 8 Ves. 95. *Staines* v. *Morris,* 1 V. & B. 11.

since he has made choice of him as the person liable for his rent, I think, as against the *cestuy que trusts*, the bill ought to be (1) dismissed. *Sed* [G] *quær'*; for it seems, that whilst the *cestuy que trusts* received the profits, they should be liable to the rent, though not afterwards.

CLAVERING v. WESTLEY. [404]

[G] In the *Trinity* Term following this cause came by appeal before the Lord *Talbot*, who decreed one *Reed*, the lessee (who made default) to pay to the plaintiff the contribution monies he had received from each of the *cestuy que trusts* towards working and carrying on the coal mine; and if that should prove not sufficient, the *cestuy que trusts* that were living, and the representatives of such as were dead, and who were all before the court, to contribute each one fifth towards satisfying the plaintiff the arrears of rent that had incurred during the time they had concerned themselves in taking the profits. The plaintiff to have back the 10*l.* deposit.(2)

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(1) Reg. Lib. A. 1735. fol. 136.

(2) The decree on the appeal was, "that it should be referred to the Master to take an account of what was "due to the plaintiff for rent and otherwise on the foot of the lease and the "covenants therein contained, and the "same was to be paid to him by the "defendant *Reed* (the lessee): but in "case the defendant *Reed* should not "pay the same at such time and place "as the Master should appoint, it was "ordered and decreed, that the Master "should take an account between the "several defendants on the foot of the "articles (by which *Reed* declared the "trust for the five partners) to the end "it might appear whether the defendant "*Reed* had sufficient of the money of "the said defendants, and the deceased "partners respectively, remaining in "his hands to answer their shares of "what should be found due to the "plaintiff; and in case the defendant "*Reed* had not sufficient for that purpose, the said defendants respectively (the representatives out of assets only) were to pay to the plaintiff "one fifth part of what shall be so found "due, or so much thereof as, together "with their respective shares of the "money in the hands of *Reed*, would "make up such fifth, and what should "thereafter become due from the defendant *Reed* to the plaintiff, upon "the said lease and covenant was to be "paid to the plaintiff by the defendant "*Reed*; or in default thereof the said "defendants respectively were to pay "one fifth part thereof, or so much "thereof as together with their shares "of the money in the hands of the defendant *Reed* would make up such "fifth." Reg. Lib. A. 1735. fol. 526. by the name of *Clavering* v. *Reed*.

DE

TERM. S. HILARII, 1735.

Case 113.

EX PARTE ROWLANDSON.

Lord Chancellor TALBOT. 2 Eq. Ca. Ab. 110. pl. 2. If A. and B. are bound in a bond jointly and severally to J. S., he may elect to sue them jointly or severally; but if he sues them jointly, he cannot sue them severally, for the pendency of one suit may be pleaded in abatement of the other: by the same reason, if A. and B., joint traders, become bankrupt, and there are joint and separate commissions taken out against them, and A. and B. before the bankruptcy, become jointly and severally bound to J. S., J. S. may choose under which commission he will come, but shall not come under both.

THE case was, *John Crosfield* and *James Birket*, were partners in trade, and bound jointly and severally in their joint and several bond to the petitioner *Rowlandson*. 27th of *October*, 1734, a joint commission was awarded against *Crosfield* and *Birket*, who were found bankrupts, and their estate and effects made over to assignees, in trust for their creditors. Afterwards a separate commission was sued out against each of the partners, and each upon this commission was also found a bankrupt.

The petitioner proved his debt under all three commissions, and received a dividend under the joint commission of —— shillings in the pound; and having also applied to the commissioners under each of the separate commissions, to be let into his dividend under such separate commission, and being by them refused, in regard of his having received the same under the joint commission, he now applied to the Lord Chancellor to be admitted to receive his dividend under the separate, as well as under the joint commissions.

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The Lord Chancellor at first inclined to think, that the petitioner being a joint and a separate creditor, ought to be at liberty to come in under each of the commissions, provided he received but a single satisfaction; but the next day his Lordship held, that as at law, [A] when *A.* and *B.* are bound jointly and severally to *J. S.* if *J. S.* sues *A.* and *B.* severally, he cannot sue them jointly, and on the contrary, if he sues

[A] If three are bound jointly and severally, the obligee cannot sue two of them jointly, for this is suing them neither jointly nor severally. *Roll. Abr.* 148.

them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other: so, by the same reason, the petitioner in the present case ought to be put to his election, under which of the two commissions he would come; and that he should not be permitted to come under both; for then he would have received more than his share; but his Lordship said he would hear counsel, if they had any thing to object against this order.

Whereupon it was now offered, that it was true, if at law two men are bound jointly and severally in a bond to *J. S.*, the obligee may either sue the bond jointly against both, or severally against each, at his election; but on his suing them jointly and severally at the same time, the pendency of one suit may be pleaded in abatement to the other; but the reason of this is, for that if the obligee sues the obligors jointly, and recovers judgment, the plaintiff in such case is [407] at liberty to take as well the joint as the separate effects of each of the obligors in execution. Now, in such case, he can have no more than all the effects of each; consequently, during such joint suit it would be fruitless, and indeed vexatious, to bring a separate action against each of the obligors; but that nothing could be inferred from hence against a just creditor's taking under each of these commissions the utmost advantage allowed him by law; and that the bankruptcy of the debtor ought not to hinder him of such advantage, so as he did not receive a double satisfaction.

For which purpose a case was cited, as determined by the Lord *King*, *Sept.* 6, 1732, where a joint commission issued v. *Stainer*, *Jones*, and *Prestland*, who were partners and joint-traders; and one *Rice Vaughan* proved a debt of 3251*l.* under the commission, and received a dividend of 4*s.* in the pound.

Afterwards *Rice Vaughan*, having likewise a separate bond from *Stainer*, for the same debt, sued out a separate commission for it against *Stainer*, and petitioned that the commissioners and assignees under the joint commission might deliver up the separate effects of *Stainer*, in order that the petitioner might receive a further satisfaction towards his debt out of *Stainer's* separate estate. On the other hand the joint creditors petitioned, that the separate commission might be superseded, forasmuch as *Rice Vaughan* on whose petition the separate commission had issued, had been al-

Ex parte -Rowland-son.

lowed for the same debt under the joint commission, *(viz.)* 4*s.* in the pound. But it was ordered, that the assignees under the joint commission should deliver up the separate effects of *Stainer*, to the end they might be applied to pay the separate bond.

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And it was insisted, that this was a case in point; for here *Rice Vaughan* was a joint creditor of *all* the partners, and also a separate creditor of *one*, and had proved his debt, and taken his dividend under the joint commission; notwithstanding which he was allowed relief as a separate creditor for the same debt.

If two joint-traders owe a partnership debt, and one of the partners gives a bond as a collateral security for payment of this debt; here the joint debt may be sued for by the partnership creditor, who may likewise sue the bond given by one of the traders.

But the Lord Chancellor observed this difference between the cases: in that which had been cited, there was a single bond given as a collateral security for the same debt, by one of the partners only: but in the principal case, the bond upon which the petitioner would seek relief under the separate commission was not only for the same debt, but given by both the parties; and the plea in abatement would have been proper, had the bond been sued at the same time both as a joint and several bond, which cannot be, where there is only a separate bond. Then taking this to be the rule at law, that a joint and several bond cannot be sued at one and the same time, both jointly and severally, but that the obligee must make his election; so it ought to be (he said) in the principal case. And this would best answer the general end of the statutes concerning bankrupts, which provide, that all debts shall be paid equally, as in conscience they are all equal; that it is upon this foundation, that debts of a partnership have been ordered to be first paid out of the partnership effects (*a*), and that afterwards the joint creditors, when the separate creditors are satisfied, may come in upon the separate effects, but not before; and so *vice versâ*, the separate creditors are to come first on the separate effects of the partners, and if these not sufficient, then on the joint effects, after the partnership creditors are paid.

(*a*) Vide Horsey's case, ante 23.

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And therefore, that there might be an equality in the principal case, his Lordship ordered, that the petitioner should make his election, whether he would come in for a satisfaction out of the partnership, or the separate effects, but not out of both at the same time; however, his having received his dividend out of the joint effects, on the joint commission, whilst this matter was in suspence, was not to bind him;

and provided he brought that back again, he might come in for a satisfaction out of the separate effects; and he to have a month's time to make his election. (1)

Ex parte ROWLANDSON.

(1) Ex parte *Bond*, 1 Atk. 98. Ex parte *Blankenhagen*, Cooke's Bank. Law, 164. (z)

(z) *Ex parte Bentley*, 2 Cox, 218. 10 Ves. 107. *Ex parte Hay*, 15 Ves. *Ex parte Bevan*, 9 Ves. 223., and 4. *Ex parte Liddel*, 2 Rose, 34.

14 Jur. 899.
10. Q. B. D. 129.

HEARD ET UX' *v.* STAMFORD.

1892 2 Ch. 520

Case 114.

Lord Chancellor TALBOT.

Ca. temp. Tal. 173.
2 Eq. Ca. Ab. 134. pl. 5.
A woman indebted dum sola, marries, and brings a portion to her husband, and dies; equity will not help the creditor against the husband to the value of what he received with the wife.

A FEME sole was indebted to her sister in 50*l.* by note; she married, and brought a personal estate to the value of 700*l.* to her husband, with whom she lived about a year and a quarter, and then died; the creditor by note never recovered judgment against the husband and wife, and the debt remained unpaid. The husband, on the wife's death, administered to the wife. The sister married, and with her husband brought a bill against the defendant, and finding that the *choses en action*, of which the wife died possessed, were not sufficient to pay the 50*l.* debt, which the wife owed *dum sola;* it was prayed that the defendant the husband, for so much as he had received out of the clear personal estate of the wife upon his marriage, should be made liable to answer the plaintiff's demand.

And it was insisted to be but common reason and justice, that as the wife was the owner of a visible estate, upon the credit of which the plaintiff might have intrusted her; so he that had such estate should pay the debt, which he might well afford to do; that it would be a case full of hardship, if a feme sole, who in ready money, goods, jewels, terms for years, &c. might be worth 10,000*l.*, and might owe 1000*l.*, if such woman should afterwards marry, and die, that on her death, her husband should go away with the 10,000*l.* and not be obliged to pay one farthing of his wife's debt; this would prove of the most pernicious consequence to the creditors; whereas, on the other hand, the husband could have no reason to complain of being liable to answer their de-

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mands, as far as he had received a fortune with his wife; that the author of a book, intituled *The Office of Executors*, (a book well esteemed) chap. 17. touching a feme covert's being executrix, takes notice of this case as a very hard one, and indeed recommends it as proper for the consideration of a court of equity; that accordingly the court has granted relief under such circumstances, as appears from the *Chancery Reports*, 295. *Freeman* v. *Goodham*, where a feme *dum sola* bought goods, but did not pay for them, and afterwards married, and died, having brought a good portion, which came to the hands of her husband, who, on the creditors filing a bill against him, to be paid for the goods, demurred. The Lord Chancellor *Nottingham* over-ruled the demurrer, saying with some earnestness, *that he would alter the law in that point*. So in the case of *Powell* v. *Bell*, *Abridgment of Cases in Equity*, 60. pl. 7. *Precedents in Chancery*, 256. it was decreed, that the wife who had contracted debts *dum sola*, being dead, the husband should account for what he had received with her, and should be so far liable to her debts; and there Mr. *Vernon* is said to have informed the court, that he had often known it so held. It was moreover insisted, that one precedent relieving a creditor, was more to be regarded than three to the contrary.

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Lord Chancellor. It is extremely clear, that by law the husband is liable to the wife's debts only during the coverture, unless the creditor recovers judgment against him in the wife's lifetime; and I do not see how any thing less than an act of parliament can alter the law. The wife's *choses en action* are assets, and will be liable: but these, it seems, are not sufficient in the principal case to answer the demand. In the case of *Freeman* v. *Goodham*, there was some reason for the court to be provoked, when the goods themselves continued, after the death of the wife, in the hands of the husband, who notwithstanding refused to pay for them. It is true, it appears the then Lord Chancellor over-ruled the demurrer: but what was done afterwards, what decree his Lordship made, whether the cause was ever heard, or whether the bill was not dismissed, does [B] not appear. Neither

[B] Upon searching the Register's book it appears, that in the case of *Freeman* v. *Goodland et e cont'* (not *Goodham*) the defendant had married the testator's widow, who had bought goods of the testator's executors; that after the widow's death, the executors' bringing their bill (*inter al'*) to be satisfied for these goods, the defendant demurred, which demurrer was on the 18th of *December*, 1676, over-ruled by the Lord Chancellor: that afterwards on the hearing

in the case of *Powell* v. *Bell*, is any notice taken what estate the wife had in her own right, and what as administratrix to her former husband.

If I relieve against the husband because he had sufficient with his wife wherewith to satisfy the demand in question; by the same reason, where a feme indebted *dum sola* afterwards marries, bringing no fortune to her husband, and judgment is recovered against the husband, after which the wife dies, by the same reason (I say) I ought to grant relief to the husband against such judgment, which yet is not in my power; consequently, there can be no ground for a court of equity to interpose in the present case. If the law as it now stands be thought inconvenient, it will be a good reason for the Legislature to alter it: but till that is done, what is law at present must take place.

So on the other hand, where a woman indebted dum sola, marries and brings no portion to her husband, against whom judgment is recovered for such debt, and then the wife dies, equity will not relieve the husband against the judgment.

The next morning the case of *The Earl of Thomond* v. *Earl of Suffolk*, (*a*) was cited to have been adjudged by the Lord *Macclesfield*, wherein this was one of the very points in question; and the Lord *Macclesfield*, for much the same reasons as had been given by the Lord *Talbot*, denied to relieve a creditor of the wife *dum sola*, against the husband who survived, and on the marriage had sufficient personal estate wherewith to answer her debts. Whereupon the Lord Chancellor took notice, that although the matter now in question was inconsiderable in value, yet the case itself was of great consequence; for which reason, if the counsel for the plaintiff were dissatisfied, he would, he said, hear them again to it. But the above mentioned case of the Earl of *Thomond* being insisted on as in the very point, the counsel acquiesced, and did not stir the matter again. (*b*)

(*a*) Vol. 1. 470.

(*b*) Note; the same point had been determined by the Lord King in the case of Jordan *v.* Foley, Trin. 11 G. 1.

of the cause the 2d of *December*, 1678, the defendant insisted that his wife had a property in these goods at the marriage, which were part of her portion: but nevertheless to avoid further trouble, and in case an assignment of some leasehold estates mentioned in the cause were made to him, (though he was not liable by law so to do) yet by his counsel he offered to pay for the goods, whereupon the decretal order runs thus:—"That the defendant *Goodland* do pay to the "said executors the sum of 350*l.* reported due to them on account of the said "goods, *according to his offer aforesaid.*" So that this being a decree in consequence of the defendant's offer, here appears to be no express determination in the point; however, it is very probable that the defendant perceiving which way the opinion of the court inclined on arguing the demurrer, was induced to make the above mentioned offer.

Case 115.

SMITH *v.* TURNER.

Lord Chancellor TALBOT.

THIS cause was heard; and there appearing to the court some reason to suspect that the defendant had a deed in his custody, it was ordered that he should be examined on interrogatories touching the deed. Accordingly he was examined, and denied his having the deed, and all the circumstances relating thereto.

2 Eq. Ca. Ab. 205. pl. 2. 419. pl. 13. After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses in order to falsify the defendant's examination; this tending to multiply causes, and make them endless.

The Master certified notwithstanding, that he thought it reasonable the plaintiff who prayed a commission to examine witnesses, in order to falsify the defendant's examination, should have one. And now on motion for such commission, and after hearing counsel on both sides,

The Lord Chancellor ordered, that the plaintiff should not have such commission; for at this rate three or four causes might spring out of one; and though there could be no mischief in examining the party himself, yet the examining witnesses after publication passed, especially where it may relate to the matter in issue, is against the rule of the court, and may be greatly inconvenient, and make causes endless.

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Case 116.

KING *v.* WITHERS.

[In Domo Procerum.]

Lord Chancellor TALBOT.

THE bill was brought for the recovery of a legacy of 3,500*l.* given by the will of *Charles Withers*, the father, to *Henrietta Maria* his daughter. The case was; *Charles Withers*,

1 Eq. Ca. Ab. 112. pl. 10. Ca. temp. Tal. 117. Pre. Cha. 348. Gilb. 26. 4 Bro. P. C. 228. 2 Eq. Ca. Ab. 656. pl. 10. One having a son and a daughter, devises to his daughter 2,500*l.* at her age of 21, or marriage, which should first happen; and if his son should die without issue male of his body then living, or which afterwards should be born, then his daughter to have at her age of 21, or marriage, which should first happen, 3,500*l.* over and above the said 2,500*l.*; and in case the contingency of the son's so dying shall not happen before the daughter's age of 21, or marriage, then she to receive the said additional sum whenever it shall happen. After which the testator entails his real estate, subject to the above mentioned charge, on the heirs of his body, remainder to his brother in fee. The testator dies, the daughter marries, has issue, and having attained 21, dies. Her husband administers to her; after which the testator's son dies without issue male; the 3,500*l.* shall not sink, but on the personal estate proving deficient, shall be raised for the benefit of the daughter's administrator.

the father, had a wife named *Dorothy*, and one only son *Charles Withers*, and one only daughter *Henrietta Maria*, afterwards married to the plaintiff Dr. *King*.

Charles Withers, the father, was seised of a real estate of 900*l. per annum*, and possessed of a great personal estate, and by his will dated 3 *June* 1697, duly executed, gave to his daughter *Henrietta Maria*, 2,500*l.* at her age of twenty-one, or marriage, which should first happen, declaring his intention and meaning to be, that if his son *Charles Withers* should die without issue male of his body then living, or which afterwards should be born, then his said daughter should have and receive at her age of twenty-one, or marriage, which should first happen, 3,500*l.* over and above the said 2,500*l.* After which he intailed his real estate on the heirs of his body, with remainder to his brother *Andrew Withers* in fee; and directed, that in case the said contingency of his son's dying without issue male should not happen before his daughter's age of twenty-one, or marriage, then she should receive and be paid the said 3,500*l.* whenever it might after happen, and made his wife *Dorothy*, his brother *Andrew Withers*, and one *John White*, executors, declaring further, that his land before mentioned in his will should be liable and chargeable with the payment of this 3,500*l.* whenever it might become due and payable.

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In *August* 1697, *Charles Withers* the testator died. *Charles Withers* the son intermarried with *Frances Wavell*, by whom he had issue three daughters, the defendants. The plaintiff Dr. *King* married *Henrietta Maria*, the only daughter of the testator *Withers* the father, and had issue *Charles King*, now living. *Henrietta Maria*, the wife of the plaintiff Dr. *King*, died, having attained twenty-one, and the plaintiff Dr. *King* administered to her. *Charles Withers* the son died, without issue male, leaving his said three daughters. *Dorothy Withers* likewise died; and the personal estate being deficient, the plaintiff Dr. *King* brought his bill to recover this additional portion of 3,500*l.* and interest.

11th of *July*, 1735, the Lord Chancellor *Talbot* declared, that the said 3,500*l.* was and is a subsisting charge on the testator's real estate; and decreed an account of the personal estate, and of the rents and profits of the real estate devised by the testator *Charles Withers*, for the payment of his debts and legacies; and that this 3,500*l.* should carry in-

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terest from the death of *Charles Withers* the son, together with costs of suit.

From this decree the defendants applied to the Lords; and insisted, *first*, that the additional portion of 3,500*l.* was

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given to the testator's daughter *Henrietta Maria*, upon two contingencies, (*viz.*) upon *Charles Withers* the son's dying without issue male living at his death, and upon her the said *Henrietta Maria*'s attaining her age of twenty-one, and that both these contingencies ought to have happened in the life-time of the said *Henrietta Maria*, otherwise the conditional legacy could not vest in her so as to be transmissible to her administrator as a charge on the real estate, and to be raised thereout in prejudice to the appellants, the coheirs at law, but ought to sink in the inheritance, agreeably to those (*a*) many determinations in the courts of equity, where in the case of portions given to younger children, payable out of lands at a future time, before which time such children have happened to die, it has been held, that the portions did not vest, nor were raisable for the benefit of the executors or administrators of such children, but ought to sink for the benefit of the heir or remainder-man.

(*a*) See Pawlett *v.* Pawlett, 2 Vent. 366. 1 Vern. 204, 321.

Secondly, It was observed, that this additional portion of 3,500*l.* was not made payable to the executors or administrators of the said *Henrietta Maria*, the late wife of the plaintiff Dr. *King*; which shewed, according to them, that it was the testator's intention, that the said sum should not be paid to her executors or administrators out of his real estate, which he had intailed on his family, nor go to a stranger who had before received a portion of 2,500*l.* with the daughter, and who had made no additional settlement on her, in recompence for such additional portion: and though it might be objected, that possibilities or contingent interests go of course to executors or administrators, even though the legatees die before the happening of the contingencies; yet this

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was said to hold only where the contingent interest arises out of a personal, not out of a real estate.

On the other side it was answered, that it appeared to have been the intention of the testator to make a provision for his only daughter, not barely by giving her a portion of 2,500*l.* to be paid at her age of twenty-one, but also an additional legacy of 3,500*l.* payable on a contingency of his only son's dying without issue male then living, which had happened.

That the testator's daughter *Henrietta Maria*'s dying in her brother's life-time could not be any objection to her having the additional legacy of 3,500*l.* since it was particularly directed by the will, that though the contingency should not happen before her attaining the age of twenty-one, or marriage, yet such additional legacy should be paid whenever the contingency should afterwards happen, without annexing any restriction thereto or adding the circumstance of the daughter's being then alive. And in another part of the will the testator expressly declared his intention to be, that the lands and premises thereby devised to his son *Charles*, with remainder in fee to his brother *Andrew*, should be liable to and chargeable with the payment of the said 3,500*l.* whenever it might happen to become due and payable, which shews the strongest intention imaginable in the testator, that the said 3,500*l.* should be a charge on his real estate, on the death of his son *Charles*, without issue male, whenever such event might happen, whether the testator's daughter *Henrietta* were at that time living or not; that these clauses seemed inserted on that purpose and with a particular view to prevent the question that had now been started; for, being taken together, it was hardly possible for the testator to have expressed himself in more explicit and decisive terms; that [418] the case of *Jackson* v. *Farrant*, *Precedents in Chancery*, 109, and 2 *Vern.* 424. was determined agreeably hereto; lastly, that the principal case differed entirely from that of *Poulet* v. *Poulet*, where the daughter dying about the age of nine years, had consequently no occasion for a portion; whereas here the daughter lived to be married, and left a child, and this additional provision might justly be presumed to have contributed somewhat to the advancement of her in marriage.

For which reasons it was prayed that the decree might be affirmed, and it was affirmed accordingly with costs, 16 *March*, 1735.(1)

(1) Vide *Duke of Chandos* v. *Talbot*, ante, 2 vol. 612.

DE

TERM. S. MICHAELIS, 1717.

DOMINUS REX *v.* JOHANN' BIGG.

Arguments before all the Judges at Serjeants' Inn, *in* Fleet Street.

1 Stra. 18. One with lemon juice takes out a receipt written on the inside of a bank note, but called an indorsement; this held to be rasing an indorsement within 8th and 9th of W. 3. cap. 19. sect. 36., and to be felony without clergy.

THIS was a special verdict found at the *Old Bailey*, where the prisoner, *John Bigg*, was indicted for rasing out an indorsement of 90*l.* made on a bank bill for 100*l.* which is made felony without clergy, by a late act of the 8th and 9th of *W.* 3. *chap.* 19. *Par.* 36.

The indictment set forth, that on the 19th day of *February*, 1714, and long before, one *Joshua Adams* was entrusted and employed by the governor and company of the bank of *England*, to sign bank notes for the said company,
[420] for the payment of money by them payable: that afterwards the same day and year, the said *Joshua Adams*, being so entrusted and empowered by the said company, did make a certain bank note under his own hand, and signed by himself on behalf of the company, dated the 19th of *February*, 1714, by which note the said *Joshua Adams*, on behalf of the said company of the bank of *England*, did promise to pay to Mr. *James White*, or bearer, one hundred pounds on demand: that afterwards on the 22d of *February*, 1714, on behalf of the said company of the bank of *England*, the sum of ninety pounds, part of the said sum of one hundred pounds in the said note mentioned, was paid to the bearer of the

said note; and that thereupon, on behalf of the said company, *quoddam scriptum Anglice* an indorsement on the said note was duly made and written, specifying, that 90*l.* was paid the same 22d of *February*, 1714: that the prisoner, *John Bigg, endeavouring to make an unlawful gain to himself, and to defraud the company of the bank of* England, *of great sums of money;* after the payment of the said 90*l.*, and after the said indorsement made upon the said note, (*viz.*) on the first of *March* in the same year, feloniously *erasit* that indorsement upon the said note, *contra pacem domini regis, et contra formam statut' in hoc casu nuper edit' et provis'.*

Upon *Bigg* the prisoner's pleading not guilty to this indictment, the jury found a special verdict, (*viz.*)

They found, that the said *Joshua Adams*, on the said 19th of *February*, 1714, was entrusted and employed by the governor and company of the bank of *England, but not under their common seal*, to sign for the company bank notes for the payment of money payable by the company: that the said *Joshua Adams*, being so entrusted and employed as aforesaid, on the 19th of *February*, 1714, did make the note in writing mentioned in the indictment, [421] signed under the said *Joshua Adams'* own hand on behalf of the said company; by which note the said *Joshua Adams*, on behalf of the said company, promised to pay to Mr. *James White*, or bearer, on demand, the sum of one hundred pounds; that on the said 22d day of *February*, 1714, on behalf of the said company, the said 90*l.*, parcel of the said sum of one hundred pounds in the said note contained, was paid to the bearer of the said note; and that on the said payment, *on and across the writing of the said note*, the words and figures following, (*viz.*) 22d of *February*, 1714, *paid ninety pounds*, were in due manner, on behalf of the said company, written with red ink, *upon the face and inside of the said note;* that the said *John Bigg*, on the first of *March*, in the said year, after the payment of the said 90*l.* and the inscription thereof on the said note, by a certain liquor to the jury unknown put by the said *John Bigg*, upon the words and figures so written upon the said note, with red ink as aforesaid, the same words and figures *totaliter expunxit et delevit.*

Also the jury found, that at the time of making the act of parliament, intituled, an act for making good the deficiency of several funds therein mentioned, and for enlarging the

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capital stock of the bank of *England*, and always afterwards, to the 28th of *November*, 1696, the way only used for indorsing of bank notes was, by writing on the *backside* of the said notes with black ink; but that afterwards on the 28th of *Nov.* 1696, and from thenceforth to this time, the way that was only used was, to write all the payments of any part of the money paid on these notes, *upon and across* the writing of the said notes, with red ink, in manner and form as is above mentioned to be written on the said note; and that such inscriptions, from the said 28th of *November*, [422] 1696, hitherto have been, and are commonly called *indorsements;* and if upon this whole matter the court shall be of opinion, that the prisoner is guilty of the felony charged upon him in the indictment, then they find him guilty; if the court shall be of the contrary opinion, then not guilty.

My Lords,

I am of counsel with the prisoner, who, I must admit, has been guilty of a very great misdemeanor or offence: but the question now before your Lordships is, whether the fact, as found by this special verdict, be felony?

I shall beg leave to speak to the case upon these several points:

First, Whether this *Joshua Adams* appears to have been well empowered on behalf of the company of the bank of *England* to sign notes for the payment of money by the bank? And I humbly take it, that on this special verdict, but more particularly the negative words of it, I mean as it is found, that *there was no authority under the common seal;* it appears *Adams* was not well empowered to sign this note on behalf of the company; and therefore, that in strictness it is not, as to this purpose, a bank note, and consequently that it is no felony to rase it, or to rase an indorsement made upon it.

Secondly, Whether this receipt of the 90*l.*, part of the 100*l.* mentioned in the note, (the receipt being written on the inside and face of the note) can be said to be an *indorsement* within the act? And I humbly hold it cannot be said to be an indorsement; and, consequently, that the prisoner cannot be guilty of rasing an indorsement on a bank note.

[423] *Thirdly*, Whether the prisoner's taking out this receipt by applying to it a liquor unknown to the jury, can be called a *rasing* of this indorsement? And I must beg

leave to hold, that it cannot be called a rasing of this indorsement.

Fourthly. Whether the indictment be good, it being for rasing the inscription, *Anglice*, the indorsement, on the back of the bill? And this I take not to be good.

Fifthly, Whether the verdict, as found, be sufficient, it not being found, that the prisoner rased out this indorsement *for the sake of lucre, or with an intent to defraud or cheat the company of the bank of* England? And I take it that the verdict, as found, is not sufficient, as to that matter.

As to the first question, whether *Joshua Adams* was well empowered by the Bank to sign this note, the Company of the Bank of *England* are a corporation aggregate, a body politic, subsisting only by fiction and supposition of law, which is invisible, and can act or speak only by its common seal; so that the common seal is the hand and mouth of such a corporation.

Formerly it was held, that a corporation aggregate could not do any thing without deed, 13 *H.* 8. 12. Afterwards, it is true, for conveniency's sake, it was allowed to act in ordinary matters without deed, as to retain a servant, cook, or butler, *Plow.* 91. *b.* 2 *Saund.* 305.; or to appoint a bailiff to take a distress, 3 *Lev.* 107. But in case of any thing of consequence, or the employing any one to act on their behalf in a matter which is not an ordinary service, a corporation *aggregate cannot do that without deed. This is the very distinction taken in *Horn* and *Ivy's* case, reported in 1 *Vent.* 47. 1 *Mod.* 18. 2 *Keb.* 567. where, in trespass for taking away a ship and sails, the defendant justified under the *Canary* patent, whereby the King granted to the company the sole trade to the *Canary* Islands; and further granted, that if any should without their licence trade thither, their ship and goods sent thither should be forfeited to the company. Then the plea set forth, that the plaintiff with his ship and sails did sail to the *Canary* Islands, and trade there, without licence from the company; whereupon the defendant did seize the ship and sails on behalf of the company, as forfeited. And on demurrer to this plea two points were held; *First*, That the letters patent could not create a forfeiture. *Secondly*, That the company could not without deed empower any third person to seize goods, for their use, as forfeited; for (say the books) the seizing of goods for the use of a corporation is an extraordinary, and not a common service.

A corporation aggregate can do nothing of consequence, or that is not an ordinary service, without deed. [*424]

Cannot without deed empower a third person to seize goods for their uses as forfeited.

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Now this shews a corporation can no more give an authority, as to personal things, without their common seal, than as to any real estate; and if the seizing of goods for the use of a corporation, as forfeited to them, be an extraordinary service, and such a power as cannot be given without deed, though this be a power for the benefit of a corporation, namely, to put them in possession of goods, which before they had a right to, and relating only to personal goods, and to no real estate; if such an authority (I say) cannot be given without deed; *a fortiori*, the Bank of *England's* empowering one to set their name to a promissory note cannot be done without deed; this being an extraordinary trust or employment, such a one indeed as, if abused, may in an hour's time endanger the ruin of the company that gives this authority.

[425] For if an agent of the bank be, under their common seal, empowered to set their names to promissory notes, and such agent should, without any consideration or value received, sign a promissory note in the company's name for five or ten thousand pounds, I do not see but that this would bind, and at the same time go near to ruin the company.

Therefore surely this is a trust not of a light nature, but of the highest concern and consequence to the company; and if in any case whatever an authority given by a corporation ought to be under their common seal, without all doubt this authority given by the company to sign promissory notes ought to be so.

It is plain a corporation aggregate cannot without deed make or enter into any contract; and by the like reason they cannot without deed empower another to do that act, which they themselves cannot do but under these circumstances. A corporation aggregate cannot without deed bind themselves to pay money; and for the same reason, they cannot without deed authorise another to charge themselves with the payment of any money. It is evident a corporation cannot without their common seal empower their servant or agent to enter, on their behalf, for a condition broken, though in the case of an estate of never so small a value, and though this be for the benefit of the corporation, and cannot possibly enure to their prejudice, 1 *Rol. Abr.* 514. *Damper* v. *Symms;* much less can a corporation empower another without their common seal to sign promissory notes in their name, whereby to charge themselves, it may be, with a million of money.

Nor to enter for a condition broken.

Nor even make an attornment.

I shall only mention one instance more of what a corporation cannot do without a deed, and that is, it cannot without a deed make an attornment to a grant of a reversion; as if lands be granted to a corporation aggregate, whether for years, or for the life of *J. S.*, and the grantor being seised in fee of the reversion, grants it over to a third person; the corporation, who have the particular estate, cannot attorn without deed; and in pleading a title to such a grant of a reversion, the deed of this corporation, purporting such attornment, must be pleaded with a *profert hic in cur'* 6 *Co.* 38. *Bellamy's* case.

Though the latter be a thing of very slight consequence.

Here then is a very strong case: An attornment is but a slight matter, being no more than a bare consent to the lessor's grant; it passes no interest from the party attorning, but the grantee is in by the grantor solely. It is favoured in law, as tending to the perfection of a grant; and therefore cannot be upon a condition subsequent, for in such case the attornment would be good, and the condition void and rejected. The making an attornment is no more than what the tenant is compellable to do, upon a proper conveyance; as that of a fine, upon a *quid juris clamat* brought against the tenant. An attornment has, in our days, by the whole Legislature been thought so trivial a thing, that by a late (*a*) act of parliament it is wholly taken away, as an useless incumbrance upon conveyancing. And if a corporation cannot do so slight a thing, as to make an attornment without deed, much less can they without deed do an act of that consequence, as to empower another to set their name to promissory notes for the payment of ever so great a sum of money.

(*a*) 4 & 5 Ann. c. 16. s. 9.

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But it will be objected; if the authorising *Adams* to sign notes in the name and on the behalf of the Bank of *England* ought to be under the common seal, then for want thereof, according to this way of arguing, all the notes and bills given by *Adams* on behalf of the Bank are void.

Resp'. This is no consequence; for in an action brought against the Bank upon a bill or note signed by *Adams*, when it shall be proved that *Adams* is an agent entrusted by the Bank, and has been used to sign bills and notes, which from time to time have been duly paid and answered by the Bank; this is evidence, and will carry with it the highest presumption, that *Adams* was lawfully authorised so to do, and consequently authorised under the common seal; and at the same time it may be impossible for a third person, that sues this

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bill or note, to produce such authority under the common seal of the Bank; and it would be unreasonable in the court to put him upon it, in regard the same does not belong to him; yet upon such evidence it shall be presumed, that *Adams* was well authorised under the common seal to sign such bills and notes, and consequently they will be good: but in the principal case there is no room left for such presumption, it being expressly found by the verdict, that *Adams* was not authorised under the common seal of the Bank to sign such notes. So that this objection is of no force.

But if this point should be against me, and it should be thought by your Lordships that the Bank without their common seal could authorise *Adams* to sign notes in their name, (though it be a matter of such very great moment, as, if abused, may ruin the company) but admitting this to be against me,

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Whether writing a receipt with red ink across and upon the face and inside of a note, can be called an indorsement? (*a*) Cap. 20. sect. 36.

The second question is, whether this receipt for 90*l.* written with red ink across and upon the face and inside of this bank note of one hundred pounds can be said to be an indorsement; for the statute of (*a*) 8 and 9 *W.* 3. makes it felony "either to forge or counterfeit a sealed bank bill or "bank note, or to alter or rase an indorsement on any bank "bill or bank note." The present indictment is on the latter branch; therefore, if the receipt for 90*l.* written on the face of this bank bill be not an indorsement, then the offence is not within the act of parliament.

The meaning of the word "indorse-"ment."

This receipt written on the face of the note is *not* an indorsement: the word *indorsement* is a legal word, for which there is a proper (at least a law) *Latin* word, *(viz.) indorsamentum*, as *murdrum* is the law *Latin* word for *murder*. The meaning of the word appears from its derivation from *in* and *dorsum*, and signifies what is written on the back of the deed or instrument. It is taken notice of in the *Terms of the Law*, *Cowell's Interpreter*, and *Blunt's Dictionary*; and is frequently applied to a condition of a bond, in ancient times commonly written in parchment; and the condition is commonly written on the back of the bond, and called an indorsement. And this being the plain signification of the word in the common use of it, manifestly implied from its derivation, how then can it signify any thing written on the face and *inside*, and not on the *backside* of the note?

It is true, the verdict finds, that some time since the making of this penal statute, it was usual for the bank to

write the receipt for any part of the money paid upon the face and across the note with red ink; and that this receipt, though written on the face and inside of the bill, is, since the act, commonly called an indorsement.

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But surely this cannot be material; for by the jury's finding that this writing the receipt with red ink across and on the face of the note is commonly called an indorsement, by this (I say) it is implied, that it is not always called so, nay, that sometimes it is called otherwise. The word *commonly* is uncertain: if it has been three or four times called so, it may be said to be commonly called so, and yet it may much oftener be called otherwise. Besides, as it is a proper legal word, the true and legal import thereof cannot be altered, varied, and made to signify the direct contrary; and all this by some people's making an improper use of it. This would be to make an indorsement, which is always written on the *backside* of a note or writing, to signify the very reverse, *(viz.)* what is written on the *foreside:* it would be to give such a latitude to the fancy of people, who may sometimes misname any thing, as to take away all manner of certainty.

But what renders this objection the stronger is, for that the verdict finds, that at the time of making this act of parliament, and for some time afterwards, the only way of writing receipts on the bank's paying off part of the note, was, by writing the receipt on the back of the note, which at that time, *(scil')* at the making of the act was called an indorsement and this was indeed properly and justly so called; and writing receipts on the face or across the bank note was not then practised; consequently the statute, in making the rasing an indorsement felony, must intend such an indorsement as was used at the time when the act was made, that is, such as was written on the *back* of the bank note, and could never mean a writing on the *face* or *across* the note, which was not then practised, and could not have been foreseen, without the spirit of prophecy. And if the bank have found out a *new way* of writing receipts, they must apply for a *new* act of parliament that shall extend to such their *new* invention.

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Again: this writing of a receipt across and upon the face of the bank note being a new method, and not practised when the act was made, I would put the case, that the receipt on the face of the bill, which the prisoner is indicted for rasing, had been the *first* receipt that was ever written

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in that manner, would this have been an indorsement within the act of parliament, and would it have been felony to have rased the receipt thus written on the face of the bill? Surely not.

Then I would go further; and ask, if the prisoner had rased the second, third, or fourth receipt that had been written in this matter, would this have been an indorsement within the act? I do not see how it could. When then would the rasing of such receipt written on the face of such bank notes first begin to be a felony? This would be pretty hard to determine.

Further, if this penal law did not originally, and at the time of making it, comprehend a receipt written on the face of a bank bill, under the word *indorsement*, (as it is plain it did not) shall such law in process of time grow stronger and more comprehensive than it was at first? Shall such a construction be put upon it as thereby to make that felony some years after the enacting of the law, which, at the time when [431] it was enacted, was not so? This would indeed be a strange construction, by a liberal interpretation to enlarge a penal law, contrary to the rule which says, *it shall be taken strictly*, and must tend to make *constructive felonies* as odious *as constructive* (*a*) *treasons*.

Instances where penal laws have not been extended by an equitable construction.

If it should be objected, that to rase a receipt written by the bank on the face of the note is equally mischievous, as the rasing an indorsement on the back thereof, and therefore equally within the act; this argument will not be allowed, with regard to any law that is penal, much less in the case of one that is capital, such not being to be enlarged by parity of reason, or extended by any equitable construction.

The statute of 25 *Ed.* 3. makes (or rather declares) it to be high treason to counterfeit the great seal; and in 3 *Inst.* 16, 17, these cases are cited on that branch of the act: *First*, If a man takes off the great seal from one patent, and fixes it to another writing purporting to be another grant of the king, this is held to be no (*b*) counterfeiting of the great seal.

Secondly, If one having a grant by letters patent of the

(*a*) See the 13 & 14 *Car.* 2. *cap.* 29. for reversing the attainder of the Earl of *Strafford*.

(*b*) Held otherwise in the Year Book of 2 *H.* 4. and in *Stamford Pl. Cor.* 3. But the Lord Ch. Just. *Coke* condemns that opinion, and with him concurs the Lord Ch. Just. *Hale*. *Hist. Pl. Cor.* vol. 2. 181.

manor of *Dale* from the Crown, rases out the manor of *Dale*, and inserts the manor of *Sale*, which is a greater manor, and likewise belonging to the Crown; this is also held to be no counterfeiting of the great seal.

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Thirdly, There is a case reported of an extraordinary contrivance of one *Leake*, a chancery clerk. This *Leake* being about to take a grant from the Crown, joined together two thin skins of parchment of a proper size for letters patent; and glued them so close together, that they appeared to be as one skin; and a true patent for some inconsiderable grant was written upon the outward skin, and this patent was sealed. Afterwards the party having unglued the two skins took off the uppermost skin, and then wrote a more valuable grant upon the innermost skin, and set up this title. [432]

Now, though all these three cases were equally mischievous with the actual counterfeiting the great seal; though they were all the most remarkable abuses of the great seal imaginable; yet it was adjudged that none of the above mentioned facts amounted to a counterfeiting of the great seal. So cautious have the judges ever been of enlarging penal, much more sanguinary laws, by equity; and this too in times when parliaments being less frequent, there were fewer opportunities of redressing the failings and slips in one law, by applying for another.

So that, I humbly take it, the prisoner's rasing a receipt written on the face of the bill cannot be said to be rasing an indorsement. But if this point should be also against me,

Whether taking out a receipt by putting upon it a certain liquor can be called rasing such receipt.

The next question is, admitting this receipt written with red ink across and upon the face of the bill to be an indorsement; whether the prisoner's taking out this indorsement by putting upon it a certain liquor to the jury unknown be a *rasing* of such indorsement; for so the indictment expressly says, *(viz.)* that the prisoner *erasit, &c.;* and I apprehend this cannot be called rasing.

Rasing of a deed or writing is scraping out by some knife, or other instrument: thus, *radere nomen* (*a*) signifies to *scrape* out a *name*. Suppose the prisoner, instead of pouring this liquor (which was lemon juice) upon the receipt, had poured ink, surely that could not have been called rasing out the receipt; it would have been blotting, but not rasing it out; and if putting out the words by ink had not been [433]

(*a*) *Aurelius Cotta consul, sententiam rogatus, nomen Pisonis* radendum *fastis censuit.* Vide Tacit. Annal. lib. 3.

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rasing, then no more can the putting out the words by any other liquor be so called. This taking out the words by lemon juice may be said to be an expunging or altering of the bank bill, which last is within the words of the statute. But the prosecutor has not upon that clause thought fit to indict us. We are indicted only for rasing this indorsement; whereas we insist, that the putting or taking out of the receipt by pouring a liquor thereupon, cannot be called a rasing out such receipt.

In the next place, we say the indictment is naught, as it must be intended to be an indictment for rasing the *inscriptum* on a bank note.

The statute of 8 & 9 *Will.* 3. *par.* 36. makes either of these two facts felony, *(videlicet) first*, forging or counterfeiting a bank bill or note; 2*dly*, rasing or altering an indorsement on a bank bill or note. So that the indictment is to be intended on the latter branch, that is, for rasing an indorsement; whereas it is laid for rasing an *inscriptum*, *Anglicè* an indorsement; and here this *Anglicè* is void (*a*); for the word *inscriptum* does not properly signify an indorse-
[434] ment, but a superscription; *indorsamentum* might do, or there is a proper word in the dictionary derived from the *Greek*, *(viz.) opisthographum*. But if this point should be against me, then

It is to be considered whether the verdict be sufficient, since it does not find that the prisoner did this *for the sake of lucre, or with intent to deceive or defraud the Bank.*

Whether from the preamble of the act of parliament it be not requisite, that it should appear that a person prosecuted for offending against it, has done it with an intent to make unlawful gain to himself, and to defraud the bank.

The reciting part or preamble of the clause of the act, which makes this felony, takes notice (*b*) that "whereas di-"vers frauds and cheats had been put upon the Governor "and Company of the Bank of *England*, by the altering, "forging, and counterfeiting of the bank bills and bank notes, "and by rasing and altering indorsements thereupon; be "it therefore enacted, that this be declared and adjudged "felony without benefit of clergy."

(*b*) See Sect. 36.

Now, as the recital or preamble of an act of parliament is very justly observed by the Lord *Coke* to be, as it were, a(*c*) key for opening the meaning and intent of the act; so it seems plain by this introduction or preamble, that no rasing

(*c*) 1 Inst. 79.

(*a*) If there be a proper known *Latin* word to express a thing by, no description, though with an *Anglicè*, will be sufficient. *Sty.* 313. *Floyd* v. *Morgan*, *Yelv.* 68.

or altering a bank-note can be felony, unless it be done to deceive or defraud the Bank. The preamble recites the mischief, and it is the business of the enacting part to cure that mischief.

Suppose then a man, by way of experiment, should publicly, nay, at the Bank, and in the very view of the Governors and Directors thereof, make an alteration *or rasure in a bank-note, or an indorsement of such note: suppose he should, in such public manner as I have mentioned, commit the very fact of which the prisoner is found guilty, *videlicet*, by putting a certain liquor upon an indorsement of a bank-note, take out the indorsement, and make no manner of use of it afterwards, but at the same time deliver it up to the Bank,—would this be felony? Give me leave to say, there is no colour for it: *actus non facit reum, nisi mens sit rea.*

Otherwise it might extend to a person doing it innocently and by way of experiment.

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Wherefore, taking this not to be felony, then, for aught appears by the verdict, this might be the very case, all the whole verdict might be true. The prisoner might, by putting a liquor upon the indorsement written on the bank-note, have taken out the indorsement; and yet this might have been done innocently, and without any intent to defraud the Bank. It is consequently absolutely necessary it should have been found by the jury that what was done by the prisoner was done with design to defraud the Bank.

It is remarkable that, in the late indictment against *Dawson*, this was expressly found; and I presume the counsel who perused the indictment thought it necessary in the present case, because it is inserted in the indictment that the prisoner did this to make an unlawful gain to himself, and to defraud the Bank of great sums of money.

I cannot but observe to your Lordships that, after the trial and the verdict found, this omission in the verdict being discovered, the counsel on the other side so far thought it to be material, that when we had once attended your Lordships, and had, as was then thought, settled the whole special verdict, the other side (I say) gave us a new summons in order to have this inserted in the verdict; but your Lordships with great justice said, it could not be done without the finding of the jury. Indeed, at the first sight, I was not apprehensive this defect was so material, as on a second view, occasioned by the mistrust of the King's counsel, I now find it to be. And therefore, since the whole verdict may be true, and yet the facts found to have been done by the pri-

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soner might have been done innocently and without any intention to defraud the Bank; for this reason the verdict, as found, seems defective, and not to make the prisoner guilty of felony.

Thus have I gone through what I intended to trouble your Lordships with on this occasion: I would add, that your Lordships have now before you a case, wherein the life of a man is concerned; and if all these points are not plainly for us, (as we hope that at least some of them are) but if any of them should be but doubtful, you will even then conclude *in favorem vitæ*.

Your Lordships are in the case of a penal law, penal even to life, and therefore not to be taken strictly, or aided by any intendment or equitable construction whatsoever.

Your Lordships are in a case depending on the construction of a new act of parliament at best but doubtfully penned; and the gentlemen in the direction at the Bank may, if there shall be occasion, easily obtain an act for the explanation of it, in these times of frequent sessions of parliament.

[437] Your Lordships are in a case, where, if you should be of opinion that this fact, as now found, should not be felony, yet the prisoner will not have escaped without punishment, having already suffered a year and a half's close imprisonment, and that in *Newgate*. And therefore, upon the whole matter,—

If *Joshua Adams* was not well empowered, as this verdict is found, to sign notes for the payment of money for the Bank, he having no authority under their common seal for that purpose, as we take it he was not, this being an authority and trust of the highest nature that can possibly concern the Bank:

Or if this receipt for ninety pounds, part of the sum of one hundred pounds, written across and on the face of the bank-note, be not an indorsement, (as we take it not to be, being the very reverse of the meaning, sense, common use, and derivation, of the word:)

Or if taking out the words of the receipt upon the bank-note by putting this liquor upon it be not rasing or scraping out the words, as in common sense and parlance it cannot be so taken:—

If the indictment be ill only for rasing the *inscriptum* on the bank-note, without saying the *indorsement*:—

Or if it be necessary that the verdict should find that

this fact was done with a view to lucre, and to defraud the Bank, as surely it is by reason of the preamble of the act which recites that the frauds and cheats which have been put upon the Bank were the inducement and occasion of making the act; and all the facts found by this verdict may possibly have been done innocently, and by way of experiment; for which reason it ought to have been found as laid in the indictment, that the prisoner did this with an intent to defraud the Bank: if any one of these points be with me, (as I humbly take it they all are,) then I hope your Lordships will be of opinion that this fact, as found by the verdict, is not felony, and in consequence of it, that the prisoner shall be discharged. [A]

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[A] In this case the Judges differed in opinion: but the majority of them held it to be felony. However the prisoner was transported, and not executed.

DE

TERM. S. MICHAELIS, 1735.

DOMINUS REX *v.* THOMAM BURRIDGE.

[In Banco Regis.]

The Reporter's argument for the Prosecutor.

Lord HARDWICKE, C. J. Sir FRANCIS PAGE, Sir EDMUND PROBYN, Sir WILLIAM LEE, Justices.

One convicted of felony within benefit of clergy, and sentenced to be transported for seven years, continues a felon till actual transportation and service pursuant to the sentence; and if a stranger assist such felon convict, being in custody under sentence of transportation, to escape out of prison, (provided it be such an assistance as in law amounts to a receiving, harbouring, or comforting, such felon;) the person assisting is accessory to the felony after the fact: but then, in the indictment for this last offence it must be charged that the offender had notice of the other felony or conviction.

THIS comes before the court on a special verdict found before Mr. Justice *Page*, at an assizes held at *Taunton*, for the county of *Somerset*, *April* 2, in the seventh year of his present Majesty, upon an indictment of the prisoner at the bar, *Thomas Burridge*, for aiding and assisting one *William Palmer*, convicted of felony, to escape out of prison. The indictment of this *Thomas Burridge* sets forth, that at the general quarter-sessions of the peace held at the city of *Wells* in and for the county of *Somerset*, on the 11th of *January*, in the fifth year of his present Majesty, before *Thomas Carew*, Esq. and others his Majesty's justices of the peace, * one *William Palmer* was in due form of law convicted of stealing and taking away an ewe-sheep, of the value of six shillings, of the goods and chattels of a person unknown; for which felony *William Palmer* was by the said court adjudged to be transported for the space of seven years, according to the form of the statute; and was by the said court committed to the custody of *Edward Cheney*, the then keeper of his Majesty's gaol of *Ivelchester* in the said county, there to remain until he should be transported according to the said sentence.

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And that afterwards, to wit, on the 13th of *Oct.* in the sixth year of the reign of his present Majesty, the prisoner *Thomas Burridge*, at *Ivelchester* aforesaid, did wilfully and feloniously aid and assist the said *William Palmer* to escape out of the said gaol, by means whereof the said *William Palmer* then and there did escape out of the said gaol, against the peace of our lord the King, his crown and dignity; which indictment the said justices did by their own proper hands afterwards at the gaol-delivery for the said county, on the 31st day of *July*, in the seventh year of the reign of his present Majesty, before the Lord Chief Baron *Reynolds* and Mr. Baron *Thompson*, then justices of gaol-delivery for the said county, held at *Wells* before the said justices last above named, deliver into court; whereupon at that same gaol-delivery, the sheriff of the said county of *Somerset* was commanded by the said justices, that he should not forbear by reason of any liberty within his bailiwick, but that he should take the said *Thomas Burridge* to answer unto our said lord the king touching and concerning the premises. And now, that is to say at the general delivery of the gaol of our said lord the king, of his said county of *Somerset*, of the prisoners therein, being held at the castle of *Taunton*, in and for the said county, on *Tuesday* the 2d of *April*, in the [441] seventh year aforesaid of the reign of our said lord the king, before Mr. Justice *Page* and Mr. Justice *Lee*, the said *Thomas Burridge*, under the custody of *Thomas Wellman*, Esq. sheriff of the said county, under whose custody the said *Thomas Burridge* was before committed for the cause aforesaid, being brought to the bar by the said sheriff, was arraigned, and pleaded Not guilty, and put himself upon the country; and a jury being impannelled, they find a special verdict; that is to say,—

The jury find the indictment of *William Palmer* for the felonious stealing of the sheep; and that he was convicted of that felony, and that he prayed the benefit of the statute in that case, which was allowed him; and that he thereupon was sentenced to be transported for seven years, which indictment, conviction, and sentence, the jury find *in hæc verba*. They further find, that *William Palmer* was by the said justices, at the said general sessions of the peace, committed to the custody of the said *Edward Cheney*, in the indictment mentioned, the then keeper of the said gaol at *Ivelchester*, in the said county; and that afterwards, and before the 13th

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day of *October* in the said sixth year of the king, the said *Edward Cheney*, the gaoler of the said gaol, died; and that the said *William Palmer* remained in the said gaol in the custody of *John Proctor*, then being sheriff of the said county, and not in the custody of any person or persons whatsoever contracting for the transportation of the said *William Palmer*.

And the jury further find, that no contract was made with the said sheriff, or with any other person whatsoever, for the transportation of the said *William Palmer* for the said felony, pursuant to the act in that case provided.

[442] The jury further find, that the now prisoner *Thomas Burridge* on the said 13th of *October* in the said sixth year of the reign of the King, then being a prisoner in the said gaol at *Ivelchester* aforesaid, and in the custody of the said *John Proctor* then being sheriff of the said county, did wilfully aid and assist the said *William Palmer*, so being in custody as aforesaid, to make his escape out of the said gaol; and whether upon the whole matter the now prisoner be guilty of felony, the jury leave it to the court.

The case in short.

The case is in short no more than this: one *William Palmer* was convicted of sheep-stealing, which is felony (*a*) within benefit of clergy. Upon his conviction, he prayed the benefit of the statute in that case provided, (by which must be meant the late statute of the 5th of Queen *Anne*, *chap.* 6. which allows the benefit of clergy without (*b*) reading) which was accordingly granted him. Upon this there is judgment given against him, that he should be transported for seven years; and before any contract made by any person with the sheriff, or any other, for the transportation of the said *William Palmer*, he is assisted by the prisoner at the bar to escape out of prison. And the question is, whether this *William Palmer* at the time of his escaping was a felon; or whether the felony of *William Palmer* was pardoned, either by the statute of 18 *Eliz. chap.* 7. which takes away purgation, or by the 5th of *Anne*, *chap.* 6. which allows the benefit of clergy without reading; or whether any words of the statute of 4 *Geo.* 1. (*c*) or other statute which empowers the Judge to order transportation in cases of clergyable felonies, whether (I say) any words in this or any other statute extend to pardon this *William Palmer* before his transportation and service beyond sea for seven years? For it must be admitted, that if *William Palmer* was by any of these acts pardoned

(*a*) By 14 G. 2. this is made felony without benefit of clergy.

(*b*) Sect. 4.

(*c*) Cap. 11.

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for the felony at the time of his escape, then he not being at that time a felon, it could not be felony in the prisoner at the bar to assist him to escape. But I take it, that notwithstanding any of these acts of parliament, *William Palmer* was and continued a felon at the time of his escape; and consequently that it was felony in the prisoner to assist him in order thereto.

In cases within benefit of clergy the statute of 5 Annæ takes away reading, and provides that the party shall be punished as a clerk convict.

The statute which I would beg leave first to take notice of, though not the first in time, is that of the 5th of Queen *Anne*, *chap.* 6., and it is the last clause of it. This statute recites, that "forasmuch as when any person was convicted of any "felony within the benefit of clergy, upon his prayer to have "the benefit thereof allowed him, it had been used to admi-"nister a book to him, to try whether he could read as a "clerk, which by experience had been found to be of no use: "therefore it is enacted, that if any person be convicted of a "felony within the benefit of clergy, and shall pray to have "the benefit of this act, he shall not be required to read; "but without any reading shall be allowed, taken, and re-"puted to be, and punished, as a clerk convict, which shall "be as effectual to all intents and purposes, and be as ad-"vantageous to him, as if he had read as a clerk."

So that now, without the intervention of the ordinary, (who never was more than a [A] minister attending the court, and had no part of the judicial power) the offender is to have the benefit of clergy without his reading at all. But it cannot be insisted upon, that there are any words in this statute of the 5th of Queen *Anne*, which amount to a pardon of the offender; the statute says, he shall not be put to read, but shall be taken to be as a clerk convict; but at the same time is so far from pardoning the offender, that it says the very reverse, by providing that he shall be punished, and that too as a clerk convict.

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The ordinary never acted as a judge, but as a minister only on the allowance of clergy.

[A] Upon a writ of error of a judgment upon an indictment of sheep-stealing, (as in the principal case above) amongst many other exceptions, one was, that in the entry of the allowance of clergy, no mention was made of the ordinary, (*viz.*) *quod liber traditur defendenti* per ordinar' &c. *sed non allocat'*. For, by *Holt*, Chief Justice, no mention was ever made of the ordinary for this purpose. Only formerly it was said, *traditur ordinario*, when the usage was, to deliver the clerk to the ordinary for purgation. And in the time of *Edward* Fourth, (9 *Edw.* 4. 28. *a.* 21 *Edw.* 4. 21. *b.*) it was adjudged, that the ordinary is not a judge of reading, but only an officer ministerial to the court; and upon this ground the allowance of clergy by the ordinary was never entered. *Stone*'s case, *Hil.* 6 *Gul. B. R.* from the Reporter's manuscript. See also the Lord *Hale*'s *Hist. Pl. Cor.* vol. 2. 328, 380, 381.

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But then it may be asked, what is meant here by a clerk convict, and how is such a one to be punished?

What is meant by a clerk convict; and

Now, by the words a *clerk convict* is intended any person in orders, or capable of being in orders, that is convicted by the verdict of a jury, or by his own confession, of a felony within benefit of clergy; and such a clerk convict was this *William Palmer*. And

how such a one is to be punished by 18 Eliz. (*a*) Sect. 2.

As to the next question, how such a one convicted of a felony within the benefit of clergy was to be punished? The statute of 18 *Eliz. chap.* 7. (*a*) gives a plain direction, "that "the offender, after clergy allowed, shall not be delivered "over to the ordinary to make purgation, but shall be burnt "in the hand, and after burning, he shall be delivered forth-
[445] "with out of prison;" which latter words have been taken to amount to a constructive statute pardon. So that, I think, two things are to be considered:

First, From what time a felon convicted of a clergyable felony is entitled to the benefit of the statute pardon of 18 *Eliz.*; whether from the allowance of clergy, or from the burning in the hand?

Secondly, What alterations are made as to this point by the statute of 4 *Geo.* 1. which leaves it to the discretion of the Judge to order the offender to be transported, instead of being burnt in the hand: or, with respect to the present case, whether *William Palmer*, having been convicted of felony within the benefit of clergy, and having been ordered by the Judge that tried him to be transported, is entitled to the benefit of the statute pardon, either by 18 *Eliz.*, or by 4 *Geo.* 1., *before he has been transported?*

And I take it that he is not: which point, if I shall be able to maintain, from thence it will follow, that *Palmer* continued to be a felon at the time when the prisoner assisted him to escape; and if *Palmer* was then a felon, it must be felony in the prisoner at the bar to assist his escape; and further, as I apprehend, that it does not alter the case, that no one had contracted to transport this *Palmer*, who was thus under sentence of transportation, and was assisted to escape.

From what time an offender convicted of a clergyable felony, and being allowed his clergy, shall be deemed to be entitled to the statute pardon.

With regard to the first point; the time from whence an offender convicted of a clergyable felony, and being allowed his clergy, and burnt in the hand, shall be deemed to be entitled to this statute pardon; that depends entirely upon

the statute of 18 *Eliz. cap.* 7., and on the construction that has been made thereupon; for which reason I would previously take notice, *first*, of the words of that act, and the occasion of making it; and, 2*dly*, how the words came to be construed to amount to a pardon, when they do not express any such thing.

As to the statute of 18 *Eliz. cap.* 7. the title of that part of it which relates to the present question, is, *an order for the delivery of clerks convict without purgation.* The preamble, so far as concerns this point, says, "that for the "avoiding of the sundry perjuries, and other abuses in or "about the purgation of clerks convict delivered to the ordinaries, be it enacted that all persons that at any time "thereafter shall be allowed and admitted to have the bene"fit or privilege of their clergy shall not be thereupon deli"vered to the ordinary, as had been accustomed; but after "such clergy allowed, and burning in the hand, according "to the statute in that behalf provided," (which must be meant of the statute of 4 *H.* 7. *cap.* 13. that having first inflicted burning in the hand) "the offenders shall be forth"with enlarged and delivered out of prison, by the justices "before whom such clergy shall be granted:(*a*) provided "that the justices before whom such allowance of clergy "shall be had shall and may, for the further correction of "such persons to whom clergy shall be allowed, detain "them in prison for such convenient time as they in their "discretions shall think convenient, so as the same do not "exceed one year's imprisonment; with a further pro"viso,(*b*) that one admitted to his clergy shall nevertheless "be answerable for other felonies."

(*a*) Sect. 31.

(*b*) Sect. 5.

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The original of benefit of clergy.

As this and divers other statutes take notice of the allowance of clergy, (or to speak more properly, the benefit of clergy,) it may not be amiss here to observe, what the Lord *Hobart* (288) says of the original of this privilege, (*viz.*) that the benefit of clergy was a refuge provided by common law in favour of a literate offender; but that it took its original from the great regard shewn to the church; and although at first only clerks in orders were allowed such privilege, yet afterwards this law, in favour of learning in general, was extended to all persons capable of taking orders. But as to the occasion of the statute of 18 *Eliz.* it appears from the preamble thereof, already taken notice of, to have been

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made to avoid the sundry perjuries, and other abuses committed in making purgation. The manner of these trials before the ordinary is set down in *Stamford* 138. *Hob.* 289. *Pult. de Pace Regis* 217. more fully than in any other books, and appears to have been thus:

And the manner of the trial before the ordinary,

First, the party tried was himself to make oath of his innocency; next, there was to be the oath of his twelve compurgators, who were to swear, that they believed him innocent; then the witnesses for the party tried were to give their evidence; after which, the jury were to bring in their verdict; and if the verdict was *for* the prisoner, the ordinary pronounced him innocent. This solemn form and intervention of the several persons concerned in these proceedings, with the several oaths that were made on the occasion, did create great variety of perjuries, and (which generally are their companions) subornations of perjury.

and the ill consequences that attend them.

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It is the Lord *Hobart's* remark, (291) that the witnesses in this sort of mock trials, and likewise the compurgators, who were upon their oaths *de credulitate*, as also the jury, all had their share in these perjuries. His Lordship further observes, that the Judge himself was not quite clear: he might have brought in one more for a share, (*viz.*) the party tried, who, though he had been before convicted on the clearest evidence, and though never so conscious of his own guilt, yet still was to swear he was innocent. But however, by this kind of mock trial of purgation, notwithstanding it was accompanied with so much wickedness, if the party was found not guilty, he received these advantages: he was restored to his credit and to his liberty, to his capacity of purchasing goods and chattels, and of taking and receiving the rents and profits of his own estate from thenceforth to accrue; and from that time was to be taken to be perfectly innocent. Nevertheless, such purgation had no retrospect, so as to restore to the party any of his goods and chattels, or the rents and profits of his lands that were before vested in the Crown, as forfeited on the former conviction by the verdict. 5 *Co.* 110. *Foxley's* case.

The advantages that accrued to the party, in case upon his trial he was found Not guilty.

But as the parties thus tried before the ordinary upon their purgation were generally acquitted; therefore, where a felon tried in the temporal courts was not only found guilty, but that guilt appeared to be aggravated with some heinous circumstances, in such case the temporal courts

would not trust the ordinary with the trial of the offender, but delivered over the clerk convict *absque purgatione facienda;* under which circumstances the clerk convict could not make purgation, but was to continue in prison during his life; all which time he was incapable of purchasing any personal estate, or of retaining to himself any of the rents and profits of his real estate, unless the King should be pleased to pardon him. And yet this was not without its inconveniences; for it was looked on as severe (and with some reason too) for the temporal courts, almost in any case, to send the clerk convict to the ordinary *absque purgatione facienda,* when it was to be attended with the consequences above mentioned: wherefore, generally speaking, clerks convict were delivered over by the temporal courts to the ordinary, without taking from him the liberty of making purgation; and as these perjuries (and the evil consequences of them, subornation and corruption,) usually attended such purgations; as these mock trials took their rise from factious tenets, tending to exempt the clergy from the secular courts; as this was a remnant of the Popish power, and an usurpation on the common law, it seemed high time to abolish so vain and wicked a ceremony.

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What were the consequences of delivering over a clerk convict to the ordinary absque purgatione facienda.

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For which reason this statute of 18 *Eliz.* quite takes away purgation; and enacts, "that after the offender is allowed his "clergy, he shall not be thereupon delivered to his ordi- "nary (as had been accustomed); but after he has been al- "lowed his clergy and been burnt in the hand, he shall be "forthwith enlarged and delivered out of prison by the jus- "tices that allowed him his clergy, with a proviso, that the "Judge may, if he in discretion shall think fit, continue the "offender in prison." The meaning of which last clause was, that whereas before the making of this law, it was in the power of the Judge to deliver over the offender to the ordinary *absque purgatione,* in consequence of which he was to continue in prison during his life, unless pardoned; this was thought too severe; and instead thereof, the Judge who tries the prisoner, if he finds that he deserves some further punishment, may still detain him in prison for any longer time not exceeding a year.

Purgation taken away by 18 Eliz. but the offender liable to be continued in prison for any time not exceeding a year, if the judge who tried him thinks fit.

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The second point to be considered is, how these words in the statute of 18 *Eliz.* which enacts, that the offender after his being allowed his clergy, and being burnt in the hand,

How far the words of 18 Eliz., which express nothing of pardon, came to be construed as such.

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shall be forthwith enlarged and delivered out of prison; how these words (I say) which express nothing of a pardon, have yet been construed to amount to one.

Now that was for the following reasons: as the statute of 18 *Eliz.* had taken away this proceeding before the ordinary, and by consequence deprived the offender of the opportunity of making purgation: so it was reasonable to put the offender in the same condition as he would have been in if he had performed that purgation which the act of parliament disabled him from doing.

Hard indeed it would have been, if after the offender had undergone the punishment of being burnt in the hand, and had been discharged of his imprisonment, his incapacity should still continue of purchasing or taking any goods, chattels, or personal estate, either by his own labour and industry, or the bounty of his friends. This would be for the parliament to set a man at liberty, and yet at the same time to disable him from making any proper use of that liberty; so that, to avoid such an imputation of hardship, it was very reasonable for the Judges to construe the words of this act in the sense they have done; and, where the act says, the offender after his being burnt in the hand shall be discharged out of prison, to interpret it to mean, that he shall be discharged from any further punishment; and that these words shall be taken as a periphrasis or description of a pardon. Besides, the proviso in the act which says, that the clerk admitted to his clergy shall be answerable for other felonies, [451] implies strongly, that he is never to be questioned again for this, taking the same to be pardoned by the act. See *Hob.* 291.

It remains then to see, when this pardon is to commence and take effect, and from what time the offender is to have the benefit thereof. And here the statute itself is express; for it says, after clergy allowed and burning in the hand, the offender shall be discharged out of prison.

It has indeed been contended on the other side, that the burning in the hand is not any part of the punishment, but only a mark of infamy, to notify to the court that the offender has already had his clergy, and is to have it no more; and for this is cited 5 *Co.* 50. *Biggin*'s case, and *Hob.* 294. from whence it has been inferred, that if the burning in the hand be no part of the punishment, it is not material that the prisoner should undergo it.

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Burning in the hand where the offender is admitted to his clergy, notwithstanding what is asserted by the Lord Coke to the contrary, is part of the judgment, as appears from contemporary reporters, as also from later authorities.

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But, with submission, I shall endeavour to prove, that burning in the hand *is* part of the punishment. At common law this punishment was not known, having (as is observed above) been first instituted by 4 *H.* 7. *cap.* 13. Afterwards by 10 *&* 11 *W.* 3. *cap.* 23. *sect.* 6. it was changed into burning in the cheek; and finally, by 5 *Ann. cap.* 6. *sect.* 2., re-changed into burning in the hand. It must be admitted, the Lord *Coke* says, that burning in the hand is no part of the punishment; and that this holds even in the case of an appeal of murder where the appellee is found guilty of manslaughter, (*viz.*) that even there, though it be the suit of the party, the King can pardon the burning in the hand; and from hence it is collected, that after clergy allowed, supposing burning in the hand to be no part of the judgment, then no part of the punishment being behind, or remaining to be undergone, therefore the offender immediately after clergy had is entitled to the benefit of the statute pardon; so that in the principal case *Palmer* no longer remained a felon, and consequently that it was no felony to assist him in his escape.

And yet, with all due deference to so great an authority, I must beg leave to insist, that this case, as reported by the Lord *Coke*, is not authentic, which in a great measure appears from the contemporary reports of the same case, which represent it in a quite different manner, as does also a later report. Besides which it is observable, that the very reasons given by the Lord *Coke*, for that resolution, make against, or seem at least to weaken, the force thereof.

This case of *Biggins* is reported in two other books, both of great weight, Serjeant *Moore*, and Mr. Justice *Crook;* and both their reports of it are different from, nay, contradict the report of it in the fifth *Coke*. In *Moore* 571. it is reported by the name of *Stroughborough* v. *Biggon;* and appears to have been an appeal brought by the wife for the murder of her husband, wherein the appellee was found guilty of manslaughter only. I will mention the words of the book, only turning the law *French* into *English*.

The question was, whether the general pardon could pardon the burning in the hand, (which must be meant the Queen's general pardon, for the next words are whether the Queen could pardon the burning in the hand,) and, says the book, it was agreed the Queen could not pardon it; and that the pardon could not operate thereon, because it was the suit of the party. And so (continues the book) it is like

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(*a*) 5 Eliz. c. 9. s. 14.

the case of corporal punishment on the statute of forgery or perjury, (*a*) where, if the party grieved sues by original or bill, the Queen cannot pardon it. But it is otherwise where the proceedings are in the Star-Chamber; for there the prosecutions are at the suit of the Queen. Whereupon the appellee compounded the prosecution for forty marks.

The other report of the same case is in *Cro. Eliz.* 632, 682, by the name of *Shackborough* and *Biggins*, where, in an appeal of murder, the appellee was found guilty of manslaughter. And in *Cro. Eliz.* 632. where the case appears to have been first spoke to, it is said, the court ruled, that the appeal being the suit of party, the burning in the hand could not be pardoned; and the question being stirred again in *Cro. Eliz.* 682. the court were divided, *Popham* Chief Justice, and *Clinch* Justice, holding, that the Queen could not pardon the burning of the hand, as this was at the suit of the party, and they compared it to an action on the statute of forgery: but *Gawdy* and *Fenner* Justices maintained the contrary, though it does not appear by the book that these gave any reason for their opinion. However upon this, the book says, that the appellee was advised not to run the risk of the judgment, but to buy off the appeal, and to give the appellant, the widow, forty marks to discontinue her appeal, which was accordingly done.

So that upon the whole, instead of this case being adjudged agreeably to Lord *Coke*'s report, for that the King could pardon the burning of the hand in the appeal, it appears by the two contemporary reports, that the case was never adjudged, but compounded; and that the appellee was advised by his own counsel, not to abide the event of the judgment, but to buy off the appeal.

[454] And now I would consider the reasons given by the Lord *Coke*, for what is reported by him to have been the judgment in *Biggen*'s case, which instead of supporting, do very much weaken, that authority. The reasons given by the book are, first, for that the burning in the hand is no part of the *punishment*.

But as to this, surely burning in the hand *is* part of the punishment, not only in respect of the pain by burning, which is no slight one, provided the judgment be impartially executed, (as must be supposed;) but on account of its being a lasting brand of infamy which the party is to carry about him to his grave. It is so far from being no part of the

punishment, that it is all the corporal punishment he is to undergo in this case.

The other reason given by the Lord *Coke*, in his report of this case, is still less maintainable, namely, that it is no part of the *judgment:* whereas, plainly it is the very judgment, and is so entered on the record in these words, *ideo consideratum est quod* [the offender] *in manu suâ lævâ cauterizetur*, according to what is taken notice of in Mr. Justice *Raymond*'s *Reports*, 369. *Elizabeth Celier*'s case, where the reporter observes, that the precedents in *Rastall* are so. And the same book likewise says, that *Biggen*'s case was compounded, as I have mentioned before, and never adjudged. The Lord *Coke* also at the latter end of his last reason admits, that if this burning in the hand were part of the judgment, then the Crown could not pardon it, it being at the suit of the party; and if so, then this appearing to be the very judgment, the authority of the case is plainly given up by him.

It is true, in the case of *Searle* v. *Williams*, *Hob.* 294. [455] the Lord *Hobart* says, that after the benefit of clergy allowed to the offender, the statute, though without burning in the hand, operates as a pardon. And I cannot but admit that in the case then before the court, this was rightly said, because it was the case of a clergyman in orders who was the offender; and a clergyman has the privilege of not being burnt in the hand; for the statute of 18 *Eliz.* does not require those to be burnt in the hand who are by law privileged and exempted therefrom, as clergymen are. And though afterwards the Lord *Hobart* says, that where a felon has his clergy, and ought to be burnt in the hand, yet it is not essential, but that a man may have the benefit of the statute notwithstanding he be not burnt in the hand, as where the King pardons the burning, it is equally beneficial to the offender as if he had been burnt; and that in such case, without being burnt in the hand, the offender is entitled to the benefit of a statute pardon; though I say the Lord *Hobart* asserts this, and his assertion be admitted to be law; yet what I am concerned to maintain, and which seems not to be denied by the Lord *Hobart*, is, that wherever the offender is not exempted from being burnt in the hand, either by being a clergyman in orders, or a peer of the realm, or by being pardoned; in such case the offender must be burnt in the

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hand before he is entitled by the 18 *Eliz.* to the benefit of the statute pardon.

And indeed this seems plainly implied in the last two lines of the case of *Searle* v. *Williams*, in *Hobart*, which are, "that where the statute says *after burning*, this imports "where burning ought to be; otherwise, says the book, the [456] "statute would do no good to clerks, in whose favour it was "chiefly intended."

The next case cited against me was out of the Lord *Hale's Pleas of the Crown*, 240. *cap. Clergy*, where that learned author, in reckoning up the effects and advantages of being allowed the benefit of clergy, says, that in ancient times the consequence of allowing clergy was the delivering over the offender to the ordinary, either to make purgation, or *absque purgatione*, as the case might require: but, says the book, by this statute of 18 *Eliz.* the offender shall now only be burnt in the hand; which has (namely, which burning in the hand has) these effects: 1*st*, It enables the judge to deliver the offender out of prison. 2*dly*, It gives him a capacity to purchase and to retain the profits of his lands. 3*dly*, It restores him to his credit. And for this he cites *Hob. Searle* v. *Williams*.

Now, to what words must all these effects and advantages refer? Why plainly to the last antecedent; and that is, to the burning in the hand; after which (*viz.* then or on this condition precedent) accrue to him all these advantages.

But if any doubt should still remain with regard to the construction of the books of these two eminent judges in the law, (as I hope there does not,) I shall only mention one case more on this subject, which is that of the Earl of *Warwick*, upon his trial by his peers in the House of Lords, for the murder of Mr. *Coote*. This trial was on the 28th of *March*, 1699; and though the case is not to be found reported in any law book, yet it appears at large in a very useful book, [457] which I shall mention for no other purpose but to direct to the finding it in the journal of the House of Lords, and they will be allowed to be of the greatest authority; I mean the *Collection of State Trials*, vol. 5. 167. in the trial of the Earl of *Warwick*, where the arguments of the counsel and the resolutions of the judges are related at large.

Upon that trial a question arose touching the competency of a witness, who was called on the behalf of the Earl of

Warwick; it was one *French*, who had been convicted of manslaughter, and allowed his clergy, but had not been burnt in the hand. It appeared however in the case, that the King had an intention to pardon the burning in the hand, a privy seal having been granted for that purpose; but it not having passed the great seal, the King's pardon was out of the case; and the only question was, (and which resolves our present question) whether one convicted of manslaughter, and who had been allowed the benefit of clergy, but had not been burnt in the hand, was a good witness?

REX v. BURRIDGE. Instance of a very solemn resolution, that one convicted of manslaughter, and allowed his clergy, but not burnt in the hand, nor pardoned as to the burning, was not restored to his credit.

(*a*) Sir Thomas Trevor and Sir John Hawles.

The then Attorney and Solicitor-General (*a*) contended, that he ought not to be admitted as a witness, in regard he stood convicted of felony, whereby his credit was tainted, and that credit could not be restored, unless he had been burnt in the hand, which would then have amounted to a statute pardon by 18 *Eliz.*, or unless the witness had been pardoned the burning in the hand.

On the other hand the lords heard Sir *Thomas Powis* as of counsel with the noble lord, the prisoner then at the bar; and it appears, that in the arguments on both sides, the case of *Searle* and *Williams*, from the Lord *Hobart's* report, and also the Lord *Hale's Pleas of the Crown*, were cited with the greatest advantage. It was strongly urged on behalf of the prisoner, that the allowance of clergy alone restored the party produced for a witness to his credit, and to all his capacities; and it was a plausible argument made use of by Sir *Thomas Powis*, that, after the party convicted of manslaughter had been allowed his clergy, it was a very unreasonable objection against him as a witness, that he had not that mark of infamy impressed upon his hand; and to say he could not be a witness in a court of justice, because he had not been branded as a felon.

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After hearing counsel on both sides, the lords desired the opinion of the judges, that were then attending on that solemn occasion; and the Lord Chief Justice *Treby*, with his usual clearness and accuracy, delivered his opinion against the admitting this witness, declaring, that a person convicted of felony is tainted as to his credit, and cannot be restored thereto, or admitted as a witness, until he is pardoned: that it is true, the 11th of *Eliz.* does operate as a statute pardon; but the words of that act being, *that the offender, after the allowance of his clergy, and burning in the hand, shall be enlarged out of prison*, these words make

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two things previously requisite to the pardon, *(viz.)* the allowance of clergy, and burning in the hand; both which are therefore conditions precedent: so that the person produced as a witness for the Lord *Warwick*, though he had been allowed his clergy; yet, not having been burnt in the hand, nor pardoned the burning, he remained convicted of felony, and consequently no good witness: with that opinion the rest of the judges then present concurring, the person offered to be produced as a witness for the Earl of *Warwick* was disallowed, and he gave no evidence.

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Having produced this great authority, I need not insist that burning in the hand is part of the punishment; but may from hence infer, that in the case of a layman, the burning in the hand, or the pardon of that burning, is one of the conditions required by the 18th of *Eliz.* before that act can operate as a pardon; and I think I may from hence also conclude, that it is now a settled point, settled in the highest court of justice, that, although the offender has had the allowance of his clergy, yet if he has not been burnt in the hand, and by that means undergone the punishment prescribed by that statute, he is not entitled to the pardon given thereby, but continues a felon.

2. Keen. 196. In what cases the statute of 4 Geo. 1. c. 11. in the room of burning in the hand, substitutes transportation for seven years, and how the latter is to be understood by way of condition precedent to a statute pardon, in like manner as the former was by 18 Eliz. (*a*) Sect. 1. (*b*) Sect. 2.

This leads me to the statute of 4 *Geo.* 1. *cap.* 11. which enacts, "(*a*) that where any person shall be convicted of any "offence within the benefit of clergy, it shall be lawful for "the court before whom such person is convicted, or any "other court held at the same place with the like authority, "if they think fit, instead of ordering the offender to be "burnt in the hand or whipt, to order him to be sent to his "Majesty's plantations in *America* for the space of seven "years, and to transfer and make over such offender by order "of the court, to the use of such persons or their assigns, "who shall contract for the performance of such transporta-"tion, for such term of seven years; and when such of-"fenders shall be transported, and shall have (*b*) served their "respective times for which they shall be transported, "(which in the present case is for seven years) such ser-"vice shall have the effect of a pardon to all intents and "purposes, as for that crime for which such offenders shall "be transported, and shall have so served as aforesaid."

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So that, by the express words of the statute, this transportation is to be instead of burning in the hand; and as by the 18th of *Eliz.* the offender, though he be allowed his

clergy, yet is not entitled to the benefit of the statute pardon, until he has undergone the punishment of burning in the hand, which is the punishment prescribed by that statute; so the punishment of transportation, which is in lieu of burning in the hand, where the judge who tries the offender thinks fit to order it, must also be undergone before the offender can be entitled to the benefit of the statute pardon in the present case. Or, as in the one case on the 18th of *Eliz.* the offender's suffering the punishment of burning in the hand is made a condition precedent to that statute pardon; in like manner, upon this act of 4 *Geo.* 1. the offender's having undergone the punishment of transportation must also precede the pardon given thereby.

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To this however it has been objected, that the words in the statute of 4 *Geo.* 1. are only in the affirmative, without being followed by any negative words.

Resp'. But surely this is such an affirmative, as plainly implies a negative. An act of parliament, in saying an offender shall be pardoned, or shall have the benefit of his pardon, from and after such a time, must necessarily be intended to mean, that the offender shall not have his pardon until that time. I take the rule to be, that wherever an act of parliament is introductory of a new law, (as this of 4 *Geo.* 1. plainly is, in introducing a punishment hardly known before among us, that of transportation,) words in the affirmative imply a negative, which may be made appear by innumerable instances. But as this is a large field, and might seem tedious, I shall mention but one.

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In acts of Parliament introducing a new law, words affirmative imply a negative.

The statute of 27 *H.* 8. of uses enacts, that the *cestuy que use* shall have the same estate in the land, as he had before in the use. Soon after the making of which statute, this case happened, and is reported in *Plowden*, 111, *Amy Townshend's* case, and 1 *Inst.* 348. *b.* tenant in tail made a feoffment in fee to the use of his eldest son, then an infant, and his heirs, and died; whereupon the right of the entail descended to the infant son, who was the *cestuy que use;* yet the infant son was held not to be remitted, though no folly could be imputed to the son, when he accepted the feoffment, he being then an infant, and though a remitter be a thing favoured in law, as it is a restitution of an old right: but the reason it seems was, because the statute says, the possession shall be executed *in such manner, plight, and*

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form, as the use was before limited (*a*); and though these words be only in the affirmative, they necessarily (*b*) imply a negative. See *Hob.* 298.

Especially to avoid a public mischief.

Further: If in any case such affirmative words in an act of parliament ought to receive that construction; here we have the very case, in order to prevent a great and manifest inconvenience which would otherwise happen. It would be a very great inconvenience, should there be a chasm, or interval of time, in which one convicted of a felony, for which he is ordered to be transported, might be aided or assisted by another to escape out of prison without such other person's incurring the guilt of felony: but if *Palmer* *should, in the principal case, be construed to have the benefit of the statute pardon before he is transported, merely by being allowed his clergy; then from the time of such allowance, and before his transportation, he would become no felon, and consequently it would be no felony in the gaoler, or any third person, to suffer or assist him to escape; which would be a great inconvenience arising from the construction of a statute against the express words and apparent intention thereof.

(*a*) The feoffment makes the infant in by purchase: but if he were remitted, he would be in by descent.

(*b*) Vide ante 6, in Mills *v.* Banks.

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But suppose, for argument's sake, this statute of 4 *Geo.* 1. would bear two constructions: if by one of these a public inconvenience would arise, and, on the contrary, the other interpretation would be productive of no inconvenience at all, there could surely be no doubt which of these two ought to take place. Besides, construing this statute in the sense which the other side contend for, namely, by making it amount to a pardon, either from the time of the allowance of clergy, or of pronouncing the sentence of transportation, would render useless the whole clause, which enacts, that after the offender has been transported, and shall have served beyond sea for so long a time as the sentence orders, (which in our case is for seven years;) such transportation and service shall entitle the offender to a pardon: all which clause must be rejected, and of no manner of signification, if the words are to operate as a pardon, before the transportation and seven years' service, which would be for the expositors of the law to strike a clause out of the statute book, at the same time that an useful construction may be made of it. To this I may add, that if *Palmer* is to be deemed pardoned before such time as he is actually transported, how can he be afterwards transported? How can a man be punished for a

crime, which before the punishment was pardoned? What can be more absurd than to say, an offender is first to be pardoned, and afterwards punished?

Principal case not within 6 Geo. 1. concerning rescuing felons condemned to transportation out of the hands of the contractors.

There is indeed a subsequent statute of 6 *Geo.* 1. *cap.* 23. *sect.* 5. making it felony without benefit of clergy to rescue an offender condemned to be transported, out of the hands of those who had contracted to transport him. The occasion of which clause was probably to obviate a doubt, which otherwise might have arisen, whether the custody of the contractor was a lawful prison, and within the statute *de frangentibus prisonam;* or it might have been added, the more effectually to deter all persons from attempting a rescue, by subjecting those who should make such rescue, to the guilt of felony without benefit of clergy, even though the crime for which the person rescued was in custody was within benefit of clergy. But the matter now in question is in no sort dependent upon, or relative to that clause; there having been no contract ever made with any person for transporting of *Burridge* the prisoner at the bar.

Wherefore, as this statute of 4 *Geo.* 1., empowering the Judges to order transportation for seven years in all cases of felonies within the benefit of clergy, places transportation in the stead of burning in the hand; as the offender's undergoing the punishment of burning was a condition precedent to the statute pardon; as this construction is agreeable to the express words, to the plain intent and meaning of the act, and would prevent that mischief, which would otherwise ensue, were there to be an interval of time wherein one might, with a kind of impunity, assist or voluntarily suffer to escape a prisoner condemned to be transported for felony: for these reasons, I take it, *Palmer*, though his crime was within the benefit of clergy, yet he being to be transported for seven years was, and still continued a felon; and being [464] such, it was felony in *Burridge*, the prisoner at the bar, to assist him to escape; and that it cannot be material, whether there was any contract, or not, for the transportation of *Palmer*, it being felony at common law to assist a felon to escape.

And this being the only doubt which stuck with the court at the trial of the prisoner at the bar, if that doubt be at length resolved, (which I have here endeavoured to do) I hope the court will now pronounce that sentence of transportation against the prisoner, which would have been done at the trial, had this doubt been out of the case.

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But, it is true, the ingenuity of the counsel for the prisoner has started other objections, some to the form of the indictment, as being insufficient; and some to the special verdict, as being imperfect: to which I shall endeavour to give an answer.

The omission of vi et armis in indictments being only matter of form, cured by 37 H. 8. Sed quær'.

The first exception to the indictment was, that the fact is not charged to have been done *vi et armis*.

But as inserting these words in indictments is only matter of form; so now, by the statute of 37 *H.* 8. *cap.* 8., the omission of them is helped.

The next objection was, that it does not appear by the special verdict, that when *Burridge*, the prisoner at the bar, assisted *Palmer* to escape out of prison, *Palmer* was then in custody for felony.

But this seems to be sufficiently evident: the jury find, that *Palmer* was indicted before the justices of peace of the county of *Somerset* for feloniously stealing an ewe sheep; [465] that *John Procter*, the then sheriff of that county in whose custody this *Palmer* is shewn to have then been, *ex causâ prædicta*, (that is, for the said felony,) brought the prisoner to the bar before the said justices to be tried; that he pleaded not guilty; that he was found guilty; that he prayed the benefit of the statute in that case made and provided; that thereupon the justices pronounced upon him sentence of transportation for seven years; that in consequence thereof the justices committed *Palmer* to the custody of *Edward Cheney*, the then keeper of *Ivelchester* gaol, in the said county; that the said *Edward Cheney* the keeper of the said gaol died; that this *Palmer* remained in custody of the said *John Procter*, the then sheriff of the said county; and that *Burridge* (the prisoner at the bar being then a prisoner in the said gaol, and in custody of the said sheriff,) did wilfully aid and assist the said *Palmer*, so being in custody as aforesaid, to escape out of prison.

Now these words, *that* Burridge, *the prisoner at the bar, did assist* Palmer, *so being in custody as aforesaid*, must necessarily be intended, so being in custody for felony as aforesaid; for it *does* appear by the verdict, that he was before in custody for felony; and on the other hand it *does not* appear, that he was ever in custody; and the court will not (indeed it cannot well) intend, that this *Palmer* was in custody for any other cause than that mentioned in the special verdict.

Another objection was, that it is not found by the special verdict that *Burridge*, the prisoner at the bar, knew *William Palmer* was committed for felony, or had been convicted of felony, at the time when he assisted *Palmer* to escape.

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To which it may be answered, that as *Palmer* had been convicted of felony, at the quarter-sessions of the peace held for the same county of *Somerset*, all of that county are presumed to have notice of it; otherwise, had the conviction been in another county; and it is the stronger in this case, for that *Palmer* and *Burridge* were in the same prison.

Harbouring a person outlawed for felony, though in the same county, seems not to make an accessary to the felony without actual notice of such outlawry.

In *Hale's Pleas of the Crown*, 218, it is said, that if one is tried and attainted of felony in the county of *A.*, the law presumes notice thereof in the same county: wherefore, if another person receives and harbours him in the said county, this makes the receiver accessary; *secus*, if the attainder were in another county. And *Stamford*, 41. *b.* puts the case further; if one be outlawed for felony in the county of *A.* (which is less notorious than a conviction upon a trial) and attainted thereon, if any person receives and harbours him, this makes the receiver accessary to the felony, upon a presumption that all people in the same county are privy to what is done in their own county, and to a matter of record there; but that otherwise it is of an outlawry in another county, though a matter of record.

I must admit, that the words of the Lord *Hale*, just after mentioning the same case, (*page* 218.) shew his own opinion to be contrary; for his expression is, *videtur cognitio requisita in utroque casu*, whether the outlawry be in the same or in another county [B]; and indeed this so far lessens the authority of these cases, that I would not rest this point here.

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But what I insist upon is, that *Burridge*, the prisoner at the bar, was doing an unlawful act, when he assisted the King's prisoner in the King's prison to escape out of it, whereby the course of justice was obstructed; and that

Where one is engaged in an unlawful act, he must abide by, and answer for, all the consequences of such act, though they could not be foreseen. But it seems this will not extend to involve a man in felony, unless there were originally some felonious intent.

[B] In the Lord *Hale's History of the Pleas of the Crown*, published by *Emlyn*, vol. 1. 323. his Lordship is very particular in expressing his dislike of the opinion in *Stamford;* and observes, that it oftentimes lies as little in the way of many persons to know who are convicted or attainted of felony or treason, as whether a man be guilty of it. And again, *page* 622, it seems necessary to make an accessary after, that there be notice, although the felon were attaint in the same county; for presumption shall not make men criminal, where the punishment is capital. See also the Lord *Hardwicke's* argument, post.

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being engaged in such unlawful act, he must abide by, and be answerable for all the consequences; and if a prisoner committed for felony escapes out of prison, by means of that unlawful assistance; this is felony in the person assisting. Neither will it be material that the person assisting the escape did not know that the prisoner who escaped by means of his assistance was in custody for felony, for it is all at the peril of him who engages in such unlawful act.

In the several cases where an undesigned death of a man ensues upon a person's doing any act, the difference is, if the act which the man was doing, and in consequence of which the death happens, be a lawful act, then the crime is only chancemedly, or a death *per infortunium:* but if the act be unlawful, this is manslaughter or murder. *Hale's Pl. Co.* 31. And there this further distinction is taken: Suppose I am doing an unlawful act, if it be with a felonious intent, and death ensues; then it is murder: whereas if I do an unlawful act without a felonious intent, and death follows upon it, in such case it is but manslaughter. 3 *Inst.* 56.

In *Hale's Pl. Co.* 56. *A.* throws a stone at *B.* which [468] glances and kills *C.*, this is only manslaughter, by reason there was no malicious or felonious intent: but still, says the book, it is not a death *per infortunium*, in regard *A.* was doing an unlawful act in flinging a stone at another man. The like difference is in *Keyl.* 117. in 3 *Inst.* 56. If *A.*, intending to steal a deer in the park of *B.*, shoots at a deer, and by a glance of an arrow kills a boy that lay hid in a bush; though *A.* who shot at the deer knew nothing of the boy's lying in the bush, yet this is murder. And in the same book it is said by the Lord *Coke*, if a man shoots at a cock or a hen in another man's yard, and by mischance kills a man, this is murder, because the act was unlawful.

There is indeed a remark made on this last case, in that of the *King* and *Plummer*, in *Keyl. Rep.* 116. where the Lord Chief Justice *Holt* says, that to make it murder where one shooting at an hen in another's yard, kills a man, there must be a felonious intent to steal the hen (*a*); else, according to the Lord *Holt*, the case is not maintainable, nor warranted by the books cited in the margin. However, so far will be admitted (which is all I contend for) that if *A.* shoots at an hen in another man's yard, (which must be an unlawful act, as it is against law to destroy another's property,) if

(*a*) See this same distinction taken by King, C. J., in the trial of Coke and Woodburn, for disfiguring Edward Crispe, Esq. State Trials, vol. 6. 222.

death ensues thereupon, it is [at least] manslaughter. To apply then these authorities to the present case :—

It was an unlawful act in *Burridge*, the prisoner at the bar, to assist his fellow-prisoner *Palmer* to escape out of prison, as it would be in the cases I have cited, to fling a stone at another, or to shoot at a deer in another's park, or at an hen in another's yard; and as in all these cases the killing of a person, though undesignedly, yet being in consequence of unlawful acts which the parties were doing, would make the same felony or manslaughter, (and this notwithstanding he that shot at the deer or hen should know nothing of the boy's lying in the bush, or of the man's being in the way :) so, in the principal case, the escape of *Palmer* out of prison who was in custody for felony, being the consequence of *Burridge's* unlawful assistance, makes it felony in *Burridge*, even though it should be supposed that he [*Burridge*] did not know his fellow-prisoner *Palmer*, whom he assisted to escape, was in custody for felony.

I would only mention one case more upon this head, which seems almost in point, and as great an authority as can well be produced, being at an assembly of all the Judges of *England*, and containing the resolution of ten of the Judges *seriatim*. I mean *Benstead's* case in *Cro. Car.* 583. (16 *Car.* 1.) which case was many years afterwards cited and allowed to be law, at an assembly also of all the then Judges of *England*, except the Chief Justice of the Common Pleas, that place being at that time vacant by the promotion of the Lord Chief Justice *Bridgman*, to be Keeper of the Great Seal; this is in *Keyl.* 77. *Limerick's* case, where the opinion of the Judges was in these words :—" that the breaking of a prison wherein traitors are in durance, and causing them to escape, is treason, * though the parties did not know that any traitors were there. Also to break a prison whereby felons escape, this is felony, though the prison-breaker doth not know them to be in prison for such offence."

Breaking of a prison wherein traitors are in durance, and causing them to escape, is treason, though the parties did not know any traitors were there.

It is true, in this case, thus solemnly resolved, there was a breaking of a prison supposed, which is not in the principal case. But that makes no difference with regard to this objection of the *scientèr*, whether the party assisting, &c. knew that the prisoner whom he assisted was in custody for felony, or not. It might have been the fact on which that resolution in *Benstead's* case is grounded, (and it does not appear that

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the breakers of the prison knew the contrary) that at the time when the prison was broke, there might be no prisoners there but for debt; and if so, the breaking of the prison had neither been treason nor felony by reason of the statute *de frangentibus prisonam*, 1 *Ed.* 2. *stat.* 2. Nevertheless, though the breakers of the prison might really know nothing of any traitors or felons being then in prison, yet this, according to that solemn determination, was no excuse to them, nor prevented their incurring the crime of felony, where by that means felons escaped, nor even of the crime of treason, where traitors thus escaped.

And if this be so, by the same reason the ignorance of *Burridge*, the prisoner at the bar, that his fellow-prisoner *Palmer* was in custody for felony, can be no excuse to him; for in each of these cases, it seems, the offenders were doing an unlawful act; and they must abide by all the consequences of it, even consequences that rendered them guilty of the highest crime, and subjected them to the greatest punishment known to our law, that for high treason.

[471] And now I come to the last objection, which (as I observed) seemed to stick with the court, namely, that *Burridge*, the prisoner at the bar, is not indicted for breaking the prison, nor for rescuing his fellow-prisoner *Palmer;* but for assisting him to escape, which is said to be no more, than being accessary after the fact to the felony of sheep-stealing, which *Palmer* was convicted of; and if so, the indictment is said to be wrong; for that *Burridge* ought to be indicted as accessary after the fact to *Palmer's* felony, and not as a principal felon.

But I apprehend, *first*, that *Burridge*, in assisting *Palmer*, who was in custody for felony to escape, was himself guilty of felony, as a principal, and not an accessary only. In the next place, supposing that point to be against me, and that *Burridge* be no more than an accessary after the fact, for having assisted *Palmer*, in custody for felony, to escape out of prison; yet still, I think, the indictment is good, in regard *Burridge* is indicted for aiding and assisting his fellow-prisoner *Palmer*, then convicted of felony, to escape out of prison; and if such aiding and assisting does make *Burridge* accessary, then he is indicted as such, and there is no need of mentioning the word *accessary* in the indictment.

First, I take it, that *Burridge's* assisting *Palmer*, then in custody for felony, to escape out of prison, was felony in

Burridge, who thereby became a principal felon, and not an accessary only; and that this assisting of a felon to escape out of prison when in the hands of justice, and in custody of the law, is (as I may call it) a *substantive* felony.

In 2 *Inst.* 589. it is said, that all prisons are the King's prisons; and though divers lords of liberties and others may have the custody thereof, yet still they are the King's prisons, and as they are for the public good, absolutely necessary in order to keep malefactors in safe custody until their trial, and if convicted, until they receive their punishment; therefore it is said, *interest reipublicæ quod carceres sint in tuto.* Where a man for any capital offence is committed to prison, he is presumed to be *in salvâ* as well as *arctâ custodiâ;* and it is upon this presumption of his being safe in custody, that his friends are permitted by law to comfort him, and to supply him with money, &c. when in prison. But to do this before imprisonment is so far unlawful, as to render even his nearest relations (his wife only excepted) accessary after the fact in case of felony, and principals in case of treason where there are no accessaries. So great regard has been shewn for the safety of these prisons, that originally and at common law, if a prisoner broke prison, though he was imprisoned only for a debt or trespass, and not for felony, yet it was felony for such prisoner to break prison. *Pult. de Pace* 347. *b.* 2 *Inst. ubi supra.*

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Originally and at common law, breaking prison, though by one imprisoned only for a debt or trespass, was felony: but this is altered by the statute of 1 Ed. 2. st. 2.

I must admit that the statute *De frangentibus prisonam,* taken notice of above, alters the law in that respect, by providing that a prisoner who breaks prison shall not incur the guilt of felony, unless he be committed for felony; and in such case his breaking prison is by that statute declared to be felony. There indeed, the prisoner breaking prison, though never convicted of the crime for which he was committed, yet may be tried for the felony in breaking the prison, the very breaking of the prison of itself amounting to felony. Wherein, by the way, it is observable, that by the letter of this statute, only the *prisoner* breaking prison is mentioned; and yet, the better to obviate the mischief intended to be remedied, the act, though a penal one, is by an equitable construction extended to a *stranger* breaking the prison; and therefore in *Pult. de Pace,* 147. *b. Pl.* 2. it is said, if a stranger breaks prison where one is committed for felony, this is felony; for at common law it was as much a felony in a third person to break prison, as in the prisoner

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himself; and if a stranger breaks the prison in order to help a prisoner committed for felony to escape, who does escape accordingly, this is felony, not only in the stranger that broke the prison, but also in the prisoner that escapes by means of this breach, as he consents to the breach of the prison by taking advantage of it.

If a stranger breaks prison, by which means a prisoner committed for felony escapes, it is felony, not only in the stranger but in the prisoner also.

I admit indeed that in the principal case here is no breach of prison; but still, the assisting of the prisoner to escape out of prison, by what means soever it is effected, is alike mischievous, and an equal obstruction to the course of justice: nevertheless, forasmuch as the law in the case of a breach of a prison, depends upon the words of the act *de frangentibus prisonam*, I would choose to resemble the present case of assisting a felon to escape out of prison to that of *rescuing* a felon, both these being offences at common law.

The Lord *Hale*, *Pl. Cor.* 116, says, that to rescue a person under an arrest for felony, is felony; and, that in like manner, the rescuing a person under an arrest for treason, is treason: and if this be so, *à pari*, or rather *à fortiori*, to assist a man that is in prison for felony to escape out of prison is felony; and to assist one imprisoned for treason to

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escape, must be treason. The law says that the person assisting one in prison for felony to escape, contracts the same guilt upon himself as the prisoner that was assisted to escape out of prison was committed for; so that, to deter all persons from being any way instrumental in the escapes of these capital offenders, with a great exactness of justice, the law communicates the crime of the offender to the person assisting him to escape.

Now I conceive that this assisting of a felon to escape out of prison renders the assistant a principal felon, and not an accessary only to the felon escaping. In *Stamford Pl. Cor.* 43 *b.* and *Pulton de Pace*, 144. *Pl.* 20. there is this case, which seems material to the principal one: if one does rescue a man arrested or committed for felony, he is a principal felon, and not an accessary only; and (according to these authors) the reason is, for that this is a new felony of itself, though depending on the former.

Rescuing a man arrested for felony makes the rescuer a principal felon, not an accessary only.

It seems plain, that where the Lord *Hale*, in *Pl. Cor.* 116. says that the rescuing a felon under an arrest for felony is

felony, by the words *under an arrest* is meant *a prison;* for every arrest is an imprisonment; *Hale Pl. Cor.* 107. And if the rescue of a felon when in prison makes the rescuer a principal felon, and guilty of a fresh and distinct felony; then by the same reason a person assisting one in custody for felony to escape out of prison is himself a principal distinct felon, and not an accessary only.

Besides, in this case *Burridge*, the prisoner at the bar, is so far from being an accessary, that he himself is capable of having an accessary: as if *A.* had hired *Burridge* to assist *Palmer*, then in custody for felony, to escape out of prison, and accordingly *Burridge* had assisted him for that purpose; then *A.* would have been the accessary in hiring *Burridge* to assist *Palmer* the felon to escape, and *Burridge* the prisoner, by whose assistance *Palmer* had escaped, would have been the principal: but if *Burridge* were in this case but an accessary himself, as is contended on the other side, (which must be meant of an accessary after the fact, for it cannot be pretended that he is an accessary before the fact,) I say, if *Burridge* himself he but an accessary, then *he* cannot have an accessary, for there cannot be an accessary to an accessary after the fact.

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But here I am sensible it may be objected that there may be an accessary to an accessary in the case of a felony; and so is *Hale, Pl. Cor.* 219. *Stamford*, 43 *b. Pult.* 144. *Pl.* 19.

There may be an accessary to an accessary before the fact, but not to an accessary after the fact.

To which I answer, that must be with this difference; that there may be an accessary to an accessary *before* the fact, but there cannot be an accessary to an accessary *after* the fact; and this is the distinction taken in *Jenk. Cent'* 29. *cap.* 56.; as for instance, if *A.* advise and procure *B.* to murder *C.*, *A.* by this is accessary before the fact; and though but accessary, yet if *D.* receives and conceals him from justice, *D.* hereby becomes an accessary, though only to an accessary.

To carry this case a little further: suppose *B.* that committed the murder is afterwards received and concealed from justice by *J. S.*, who thereby becomes accessary after the fact, and then *J. N.* receives and conceals from justice this *J. S.*, the accessary; this would not make *J. N.* the receiver of the accessary after the fact, to be himself an accessary: the reason of which is, for that the crime of the acces-

An accessary before the fact guilty of a much greater crime than an accessary after the fact.

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sary before the fact is much greater and of a deeper dye than that of the accessary after the fact, the accessary *before* the fact (be it in murder or other felony) advises and incites the other person to commit the crime; and being the first mover, is in a great measure guilty himself thereof; whereas the accessary *after* the fact may be, and often is, perfectly innocent of the crime, knows nothing of it until committed; only, after it is over receives the person that did the fact; in which case common compassion, good-nature, and humanity, may be, in some measure, advocates for such an offender, so as to mitigate his crime.

But what can be said in favour of the accessary before the fact, who in cool blood advises and sets on another to commit murder or other felony? The act of parliament (*a*) with great justice takes away clergy from the accessary before the fact, but does not take it away from the accessary after the fact.

(*a*) The same as to accessaries before the fact in petty treason, robbery in any dwelling-house, or in or near the highway, or the burning any dwelling-house, or barn having corn in it. See 4 & 5 Ph. & M. chap. 4. s. 1.

Again,—As *Burridge*, the prisoner at the bar, was in the same house, and fellow-prisoner with *Palmer*, and is found by the verdict actually to have assisted *Palmer* in his escape out of prison, *Burridge* must be intended to have been *present* with *Palmer*, while he was assisting him to escape: and I do not know a single case in the law where, if one be present and assisting in the commission of a crime, the person present shall be only an accessary. Cases there are, where one who is absent at the time of committing the crime may yet in law be deemed a principal, as in *Vaux*'s case, 4 *Co.* 44, 45. *Hale*'s *Pl. Cor.* 216. 3 *Inst.* 138. One laid poison with an intent to poison another person, and was absent when that other person took the poison, and was killed; there the person laying the poison was principal in the murder: but I am at a loss for an instance, where any one present and assisting was only held accessary to the felony. If one be present at the killing of a man, and comes there for that purpose, but does no act, being only ready to assist in the killing, this makes him a principal, *Hale's Pl. Cor.* 215, 216. *Pult.* 142. *a. Pl.* 4. And if being present, and only ready to aid, will make one a principal, surely this case is stronger, where *Burridge* was not only ready to aid, but actually did aid and assist.

No case where one present and assisting in the commission of a crime is held only an accessary; although one who is absent at the time of committing the crime may be a principal. [477]

But suppose for argument's sake, that *Burridge* was not

a principal felon; that he was no more than an accessary to *Palmer*, who was in prison convicted of felony for stealing a sheep; and that *Burridge* was accessary to him after the fact, in assisting him to escape out of prison; yet still the indictment against *Burridge* is right, and well maintained by the special verdict: he is indicted for having aided and assisted *Palmer*, convicted of felony to escape out of prison; and the special verdict finds this part of the fact to be so; consequently, if aiding and assisting a felon to escape out of prison does amount to make one accessary, then is *Burridge* both indicted and found guilty as such; and there is not any necessity of inserting the word *accessary* in the indictment, the same being no technical word, no term of art, like the word *burglaritèr* for burglary, *proditorič* for treason, or *rapuit* for a rape: it may with equal reason be insisted that the word *principal* is a technical term, and that where the fact is that one is principal in a murder or other felony, he must be indicted as a principal, as that in the present case *Burridge*, the prisoner at the bar, ought to be named or indicted as accessary; but this is not so, neither are there any precedents to warrant it.

In an indictment of one who is an accessary, no need of inserting the word *accessary*.

In *Tremain's Pl. Co.* 288. there is an indictment against one *Stone* for robbing one *Plumpton* on the highway, and taking from him 30*l.*; and the same indictment is against *Edward Ivy*, for that the said *Ivy*, before the said robbery, did incite, abet, and procure the said *Stone* to commit the said robbery, and that after the said robbery committed, and after the said *Ivy* knew that the said *Stone* had committed the said robbery, he (*Ivy*) did feloniously receive, entertain, and comfort him. *Stone* and *Ivy* were found guilty upon this indictment, and were attainted, and afterwards pardoned; and though it appears that *Ivy*, the accessary, brought error to reverse this attainder, and assigned errors; and though it also appears by the indictment and verdict, that *Ivy* was accessary both before and after committing the robbery; still the word *accessary* is not so much as once mentioned in the indictment, nor is this assigned as one of the errors, as most certainly it would have been, if it had been thought to have been an error. This I take to be as strong a precedent as well can be of this nature. [478]

There is another precedent in the same book, (33) *The King* v. *Ringrose*, where it appears, one was present and assisted in the felony, which in law makes a principal; and

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yet as in the former precedent the word *accessary*, so here the word *principal*, was not mentioned in the indictment. So in Serjeant *Hawkins's Pl. Co.* 2d Part, 315. it is said, not to seem necessary in any indictment or appeal against any one as accessary before the fact, to set forth the special manner by which he abetted, &c. but only to charge generally, that the prisoner *felonice abettavit, incitavit, et procuravit, &c.* agreeably to which, and in the like general words, it is said in our indictment, that the prisoner at the bar *felonice* did
[479] aid and assist *Palmer* who was convicted of felony to escape out of prison.

From whence I would infer, that if it were admitted, that in this case *Burridge*, the prisoner at the bar, were no more than an accessary after the fact to *Palmer*, by having assisted him to escape out of prison when in custody for felony; yet the indictment is good; and that it is sufficient for it to charge the fact; and if aiding and assisting a felon to escape out of prison makes one an accessary, then *Burridge* is indicted and convicted as such, and there is no need of mentioning the word *accessary* in the indictment.

There is only one thing more remains, which, though it does not now immediately and directly relate to the case, yet since it may in the event happen to have reference thereto, should the other side prevail in bringing off the prisoner, by reason of any insufficiency in this indictment; and as the court was pleased to stir this point, and to mention it to the bar, with an intention (I presume) that it should be spoke to, I shall therefore endeavour to do so in a very few words.

The point is this: suppose for argument's sake, that this indictment of *Burridge*, the prisoner at the bar, is in any respect insufficient, that he ought to have been indicted as *accessary* after the fact, and by the word *accessary;* or, to have been indicted for a *rescous*, instead of aiding and abetting: suppose, (I say) that for this or any other insufficiency in the indictment, *Burridge* should have the opinion of the court in his favour, what would the consequence of it be?

And I take it to be very plain, to be a settled point of
[480] law, that the prisoner would be liable to be indicted and tried over again; and then probably the like evidence whereon he was convicted before will convict him again:

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Wherever one escapes by means of an insufficient indictment, as his life was not thereby in jeopardy, he is liable to be again indicted.

for though the rule be, that a man's life shall not be put in jeopardy twice for the same crime, yet this holds, and is applicable only, where the indictment upon which the prisoner is tried is a *sufficient* indictment; for admitting that to be insufficient, or to contain any mistake, by reason whereof the prisoner escapes, in such cases all the books agree, the prisoner is not *legitimo modo acquietatus;* and then, in the eye of the law, his life was not in jeopardy. The court *ex officio* ought, for the benefit of the prisoner, to take notice of the mistake; and therefore in these cases the prisoner may be again indicted, though for the same offence. Many cases prove this: but *Vaux's* case, mentioned before, is very full and express to the purpose. It was thus: *Vaux* was indicted for murdering one *Richard Ridley* by poisoning him, persuading him to take a certain drink mixed with a poison called cantharides, in order to make him have a child by his wife. The jury found a special verdict, (*viz.*) that *Ridley* was poisoned by this poison; but that *Vaux*, the party indicted for this murder, was not present when *Ridley* took the poison. But it appeared to the court, that the indictment was insufficient, it not being alleged with sufficient certainty, that the party murdered took the poison, therefore the court gave judgment for *Vaux* the party indicted, *quod eat sine die.*

Whereupon *Vaux* was indicted a second time for the same murder and the poisoning of this *Ridley*, to which he pleaded, that he was *auterfoits* indicted, tried and acquitted of this murder, and pleaded over not guilty to the murder. But it being evident, that the former indictment was defective, in not having charged with sufficient certainty, that *Ridley*, the person poisoned, did receive and drink this [481] poison; the court determined, that *Vaux* might again be indicted for the same fact for the reasons above mentioned; and upon this new indictment *Vaux* was again tried, convicted, and actually hanged. So that according to this express resolution, if the indictment against *Burridge* be insufficient (as I hope it is not) he may be indicted over again for the same offence; and if it were so that he ought not to be indicted as a principal felon, but as an accessary only; even in that case it is determined in *Keyl. Rep.* 26. that if a man be indicted as a principal felon and acquitted, still he may be indicted again as accessary after the fact, but cannot be indicted as accessary before the fact, because with regard to

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an accessary before the fact, who advises and procures the doing of it; this is as *his* fact: but in the principal case, it is plain that *Burridge* was not accessary before the fact to *Palmer's* felony in stealing the sheep, but only accessary after the fact. It is equally plain, that if this indictment ought to have been against *Burridge* for a rescue, and if he should evade, for that reason, the present prosecution, (for which there seems no colour) still he would be liable to be indicted anew for that rescue, it being a different offence from what is charged in this indictment, and consequently not pleadable in bar. From all which it must be evident, how little it will avail *Burridge* to get off upon an insufficiency in this indictment, seeing he plainly will nevertheless be liable to be indicted over again.

To sum up all in a word or two: I hope it now appears, that *Palmer*, when he was assisted by *Burridge* to escape out of prison, (the said *Palmer* being under sentence of transportation for seven years) was then a felon, and continued such until his transportation and service for seven
[482] years; that there are no words in the 4 *Geo.* 1., or any other statute, entitling *Palmer* to a statute pardon, until he has undergone this transportation and service for seven years: that this is grounded on the reason of the thing, on the authorities I have cited, and upon the express words of the act of 4 *Geo.* 1.; and that in consequence thereof, if *Palmer* was, and continued a felon, when *Burridge* assisted him to escape; this was felony in *Burridge* to give such assistance. As to the several exceptions to the indictment, I hope I have answered them all; and have likewise shewn, of what small avail it will be to the prisoner, should any of these exceptions succeed; since the consequence of such success would be only a fresh indictment for a crime notorious to all the country; and of which the same evidence which was given before would again convict the prisoner: so that it would only delay this transportation beyond sea for seven years, which the sooner it is begun, will be the sooner ended. But what I humbly insist on is, that the point upon the special verdict is plainly with the Crown; that the indictment is sufficient notwithstanding any of the exceptions; and therefore pray judgment for the King, that the prisoner at the bar may be ordered to be transported for seven years, according to the statute of 4 *Geo.* 1.

Resolution of the court.

On the sixth of *February*, 1734, the Lord *Hardwicke*

Lord Chief Justice of the King's Bench, delivered the resolution of the court in these words. REX v. BURRIDGE.

In the argument of this case many objections have been made by the counsel for the prisoner, which going principally to the indictment, ought first to be considered; for if the indictment doth not contain a sufficient charge, the verdict cannot supply it. Those objections may be reduced to, and considered under, two questions. *First*, what crime of felony is charged upon the prisoner *Thomas Burridge* by this indictment? *Secondly*, Whether it be well charged, so that the court can give judgment upon it against the prisoner? The objections reducible to two questions. [483]

As to the first question, one may conjecture, and it is but conjecture, that this indictment was framed and intended to be grounded upon the statute of 6 *Geo.* 1. *cap.* 23. *sect.* 5. which makes it felony without benefit of clergy to aid or assist felons convict to make their escape out of the custody of such persons to whom they have been delivered in order to be transported: but it is so plain that the fact laid is not brought within the material provisions of that law, that it was expressly admitted by the counsel for the king not to be maintainable on this foot. First general question.

However, it has been insisted, that wilfully aiding and assisting a felon convict, adjudged to be transported, and committed to gaol, there to remain till he shall be transported, to escape out of such gaol, is by law felony; and it has been put two ways, *First*, As a new principal felony, substantive and distinct from the felony of *William Palmer*, the felon convict, who lay under the judgment of transportation; or, *Secondly*, As accessary to *Palmer*'s felony after the fact.

First, It has been endeavoured to prove this offence to be a new principal felony distinct from *Palmer's* crime, as a breach of the prison, and letting a felon therein go at large; or as a rescue of a person arrested and in custody for felony, [both] which were felony at common law.

But there is no colour to support this indictment as for an offence of breaking the prison, because no breach of it is laid, which according to all the books is in that case necessary. All that is said here is, that the prisoner assisted *Palmer* to escape, by means whereof he did escape, which might be either with the consent of the gaoler, or by going out of the prison, the doors being open; neither of which [484] In an indictment for an offence of breaking a prison, necessary to lay an actual breaking.

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would be a principal felony in the prisoner. So is *Stamford* 31 *a.* 2 *Inst.* 589, 592. in my Lord *Coke's* commentary on the statute *De frangentibus prisonam*, and *Hale's Pl. Co.* 108. in all which cases it is agreed, that an actual breaking must be alleged.

In indictment for a rescue of a prisoner, the word rescussit, or something equivalent to it, must be used to shew it was forcible, and against the will of the keeper.

We are also of opinion, that there is no better ground to support this indictment as for a rescue of *Palmer*. I believe no man ever saw, either in authority, practice, or precedent, an indictment for a rescue without the word *rescussit;* and certainly that must be charged, or something equivalent to it, to shew that it was forcible, and against the will of the officer who had the prisoner in his custody. So is *Dyer* 164. *b. West's Precedents*, Tit. *Indictment*, *sect.* 176, 181. But, notwithstanding any thing charged in this indictment, it might be a voluntary escape by consent of the gaoler, as I said before, and consequently no rescue.

But to this it was said, that to assist a felon to escape out of prison, in any manner or shape, is equally mischievous, and tending to obstruct the justice of the kingdom; and the rule is, *interest reipublicæ ut carceres sint in tuto.*

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This is very true; but the inference drawn from it is not right; for this will not warrant us to invent or create new felonies; we must take them as the law of the land has made them; and if that is defective, it belongs to the Legislature whose proper power it is *jus dare*, and not to the judges whose office is only *jus dicere*, to supply that defect.

Secondly, The other method taken to prove the offence charged in this indictment to be felony, was by shewing that the prisoner at the bar, by assisting *Palmer* to escape, became accessary to *Palmer's* felony after the fact.

One may be an accessary to a felony after the fact, by assisting a felon convict, being in custody under sentence of transportation to escape out of prison.

And we are all of opinion, that a man may become an accessary to a felony after the fact, by assisting a felon convict, being in custody under a sentence of transportation, to escape out of prison; provided it be such an assistance as doth in law amount to a receiving, harbouring, or comforting such felon.

Indeed, before the statute of 1 *Annæ*, *sess.* 2. *cap.* 9. if the principal was convicted only of a clergyable felony, and had his clergy allowed; or stood mute, or peremptorily challenged above the number of twenty jurors, the accessary could not be arraigned; by this means accessaries to very flagrant crimes frequently avoided all manner of punishment; and therefore the act provides, that in all those cases it shall

be lawful to proceed against any accessary, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding any such principal felon shall be admitted to the benefit of his clergy, pardoned, or otherwise delivered before the attainder.

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The great objection to this, and which has been much laboured by the counsel for the prisoner, is, that at the time of this fact committed, *Palmer* was no felon, and consequently there could be no accessary where there was no principal; for that the allowance of the benefit of the statute, and sentence of transportation given thereupon, do, without more, in judgment of law, amount to a pardon.

This objection opened the way to a very wide field of argument concerning the effect of the allowance of clergy, without actual burning in the hand, before the statute of 4 *Geo.* 1. *cap.* 11. for transportation of felons; and what alteration has been made by that statute in the law upon this head.

I shall not spend the time of the court by entering into a detail of this matter, as it stood before the statute of 4 *Geo.* 1. because it will not directly lead to the judgment to be given in the present case; but I shall choose to refer you to three cases, in which, being taken together, you will find all the history and learning of the law on this topic fully stated by infinitely abler hands; by my Lord *Hobart*, in the case of *Searl* v. *Williams*, *p.* 288. by my Lord Chief Justice *Holt*, in the case of the appeal between *Armstrong* and *Lisle* published at the end of *Kelynge* 93. and by my Lord Chief Justice *Treby*, with admirable clearness, in the trial of the Earl of *Warwick* for the murder of Mr. *Coote*, in the fourth volume of the *State Trials*, *p.* 383. The subject has been so much exhausted by these eminent sages of the law, that, without repeating their reasoning, I shall only make use of the conclusion from them in answer to this objection, and that is,

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that by the true construction as well as the words of the statute of 18 *Eliz. cap.* 7. which takes away delivery to the ordinary and purgation, *burning in the hand*, as well as the allowance of clergy, was necessary to the prisoner's discharge from the felony, and to constitute the statute-pardon (as it has been called) in all cases where by law burning in

By 18 Eliz. c. 7. actual burning in the hand, as well as the allowance of clergy, was necessary to discharge the prisoner from the felony; and

therefore, if before 4 Geo. 1. c. 11. an offender after clergy allowed, had escaped before he had been burnt in the hand, he would have continued a felon, and a stranger by unlawfully receiving him, &c. might have become accessary to his felony after the fact.

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the hand *ought actually to take place.* Therefore, before the act of 4 *Geo.* 1. if an offender, after clergy allowed, had escaped before he had been burnt in the hand, I hold clearly that he would still have remained a felon convict; and a stranger, by unlawfully receiving or comforting him, might have become accessary to his felony after the fact. This most plainly appears by the resolution of the Judges delivered by my Lord Chief Justice *Treby*, in my Lord *Warwick's* case which I have mentioned.

But to this doctrine some objections were made, drawn from the very cases which I have mentioned. And, first, it was objected, that in the case of *Searl* and *Williams*, my Lord *Hobart* and the whole court of Common Pleas held, that *Searl* was entitled to the full effect of his statute-pardon, though he only had clergy allowed, and was not burnt in the hand.

To this I answer: This resolution was very right, because he was clerk in holy orders, who by the statute is exempted from being burnt in the hand; and therefore it doth not contradict my rule, to which you observe I added this limitation, *in all cases where by law burning in the hand ought actually to take place.* Agreeably to this my Lord *Hobart*, just at the end of the case, hath these words: *where the statute says, after burning in the hand according to the statute in that behalf,* "*it imports where burning ought to be.*"

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2*d Object.* That the King may pardon the burning; and yet the offender shall, in that case, have the full benefit of the discharge.

Answ. This likewise is within the construction of the statute, and the rule I laid down; for, the pardon interposing, it is not a case, where by law burning in the hand ought to take place.

3*d Object.* That admitting burning to be in some degree necessary to the discharge by the statute, yet it is not to be understood of *actual burning*, but only of the judgment *quod cauterizetur;* and the judgment of transportation, which had been given against *Palmer* in this case, is at least equal to that.

Answ. But, as no authority or judicial opinion was cited for this, so there is no ground for it. It is contrary to the words of the statute of 18 *Eliz.* which says, *after clergy allowed and burning in the hand*, not *after being adjudged, or ordered* to be burnt in the hand. It is contrary to the opi-

nion of the Judges in the Earl of *Warwick's* case, and contrary to the form of pleading *auterfoits convict of manslaughter* to an appeal of murder; for there the appellee doth not only set forth the judgment of allowance of clergy, *et quod in læva sua manu cauterizetur*, but goes on and shews the execution of it by *burning*. So is the plea in the case of *Armstrong* and *Lisle*, *Kelynge* 93.

4*th Object.* But from the report of this case of *Armstrong* and *Lisle*, a further objection was taken; for there it is allowed by my Lord Chief Justice *Holt*, that, if a man be convicted of manslaughter, and prays the benefit of his clergy, and the court respite it upon a *curia advisari vult*, and remand him to gaol, he may plead it in bar to an appeal; and yet in such a case there can have been no *burning*, nor so much as a *judgment for burning*.

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Answ. This is certainly law, and warranted by the case of *Burgh* v. *Holcroft* in 4 *Co.* 45, 46.: but it doth in no wise impugn my rule; for it depends upon a particular reason, which has no relation to the general question, and which is expressly given in the report, (*viz.*) *that the delay or doubt of the court shall never turn to the prejudice of the party*. My Lord Chief Justice *Holt* goes further; and admits, that if a man should be convicted of manslaughter, and the court should not call him to judgment, whereby he would not have the opportunity of demanding his clergy, which he is not to have without a demand; or at least if he had demanded it, and the court should make no record of it, yet he might plead it, shewing the special matter; because it is the delay and default of the court, which shall not occasion a detriment to the prisoner. But none of these cases prove any thing against the general rule; and it is obvious to observe, that they might as well be produced to prove, that the *prayer of clergy*, *or allowance of clergy*, is not necessary to the discharge by the statute, as that *burning in the hand* is not so.

Where by the delay or doubt of the court, a prisoner convicted of manslaughter has no opportunity of demanding his clergy, or if he has demanded it, and the court should make no record of it; this, on its being pleaded and shewn specially, shall not turn to the prejudice of the prisoner.

Thus the law being clear, that burning in the hand was necessary before the making of the act of 4 *Geo.* 1. for transportation of felons, let us now inquire what alteration has been introduced by this new statute. Upon this the question is in short, whether it has put the judgment of transportation in the place of *actual burning in the hand* or

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Alterations made by 4 G. 1. c. 11. for transportation of felons, whereby the judgment of transportation, with regard to persons convicted of clergyable felonies is plainly and clearly put only in the place of the judgment for burning in the hand, not in the place of actual burning.

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only in the place of the *judgment for burning in the hand?* If it has put the judgment of transportation in the place of *actual burning in the hand,* then the objection is right, that *Palmer* was discharged, and became no felon; if it has put it only in the place of the *judgment for burning in the hand,* then the objection is ill-founded, and *Palmer* remained a felon convict not pardoned.

Now the words and intention of the statute are as plain as any composition or piece of writing can possibly be, that the *judgment of transportation* is put only in the place of the *judgment for burning in the hand;* and *the actual transportation and service in the plantations* is put in the place of the *actual burning.* The very first clause in the statute is, "that the court, instead of ordering (that is, adjudging) any "such offenders to be burnt in the hand, may order and di- "rect that such offenders shall be sent, as soon as conve- "niently may be, to some of his majesty's colonies and "plantations in *America,* for the space of seven years; and "that the court before whom they were convicted, or any "subsequent court held at the same place with like autho- "rity as the former, shall have power to convey, transfer, "and make over such offenders, by order of court, to the use "of any person or persons who shall contract for the per- "formance of such transportation, to him or them, and his "and their assigns, for such term of seven years."

One would have thought this had been plain enough: but the Legislature, in order to declare their own meaning, and put it beyond all doubt, have added a subsequent clause,
[491] whereby it is enacted, "that where any such offenders shall "be transported, and shall have served their respective terms "according to the order of any such court as aforesaid, such "services shall have the effect of a pardon to all intents and "purposes, as for that crime or crimes for which they were "so transported, and shall have so served as aforesaid." I will forbear to comment upon this clause, because I cannot make it clearer: one may turn and shew a very plain thing in different lights, but it is impossible to make it more plain.

But to this an objection was made by the prisoner's counsel, that, it being only an affirmative clause, without any negative words, cannot take away any discharge such felon ordered to be transported would have been entitled unto without it; and that he is absolutely discharged by the pre-

cedent clause in this act, which takes away the *burning in the hand.*

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To which I answer, that, though I admit that a new affirmative law, without negative words, shall not in many cases repeal or take away the force of a former law subsisting before that was made, and independent of it; yet an affirmative clause in an act of parliament may explain and restrain other clauses in the same act of parliament: the whole act must be construed together and entire, and when the Legislature have declared their own sense, and given their own exposition at what time the intended discharge or pardon shall take effect, it is not in the power of the Judges to make it take effect sooner, and render this clause wholly nugatory.

In what cases, and under what circumstances, an affirmative law, without negative words, may repeal or take away the force of a former law.

But what is the discharge enacted by the former clause, and how is the burning in the hand taken away? Is it taken away *absolutely*, or only *sub modo?* Most clearly only *sub modo.* Another thing is substituted in the place of it; *instead* of being *ordered* to be burnt in the hand, the offender *shall be ordered* to be transported to some of his majesty's plantations for seven years; but that judgment must be carried into execution, as the judgment in lieu of which it comes was to have been before; and if it had stood merely upon the force of this first clause, I should have thought the construction would have been just the same.

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So much of the debate at the bar turned upon this point, that I have thought fit to say thus much, in order to settle the law upon it, and to prevent any misapprehension that might arise from the judgment the court is about to give in this cause, as if any doubt remained, whether a man might assist a felon convict, lying in gaol under sentence of transportation, to break prison, or rescue him, or receive or harbour him, without incurring the guilt of felony. Such a notion going abroad might greatly weaken the security for the custody of such felons.

But, after all, the judgment of the court will fall under the second general question, which is, whether the offence be well charged in this indictment, so as that the court can give judgment upon it against the prisoner?

Second general question.

I have already shewn, that this indictment cannot be supported as for a felony in *breaking the prison*, or *rescuing Palmer;* therefore, nothing remains but to consider, whether

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it has sufficiently charged *this last offence of an accessary to* Palmer's *felony* after the fact.

And we are all of opinion it has not; and that it is materially defective in many things necessary to an indictment against such an accessary.

In all indictments against one for being accessary after the fact, by receiving, harbouring, &c. a felon, it is necessary to charge, that the defendant knew the principal was guilty or convicted of felony; and the omission of this necessary ingredient is not to be helped by the finding of the verdict; especially if the verdict does not find the fact of notice, but only what is evidence thereof.

First, It is not charged that the prisoner at the bar knew that *Palmer* was guilty, or convicted of felony: this is an essential ingredient in all indictments against a person who becomes an accessary after the fact, by receiving, harbouring, or comforting a felon. So is *Bracton, lib.* 3. *De Corona, cap.* 13. *sect.* 1 *&* 2. *Stamf.* 41 *b.* 3 *Inst.* 138. *Hale's Pl. Co.* 218. *Co. Ent.* 56, 57. *Rast.* 43 *b.* 47 *a.* 50, 53 *b.* 54 *a.* This general rule has not been disputed: but some distinctions have been taken to excuse the want of it in this indictment; as, first, that it appears here that *Burridge* was a fellow-prisoner in the same gaol with *Palmer*, and therefore it must be presumed he had notice of *Palmer*'s felony or conviction.

Answ. But this appears by the special verdict only, and not by the indictment: and, as I said at first, the verdict cannot supply a material defect in the charge; neither, if the question was upon the verdict, should I think it sufficient; because it is not the *fact of notice*, but only *evidence* of it. So in the case of the *King* and *Plummer*, *Kelynge* 111. it is laid down by my Lord Chief Justice *Holt*, that the jury might well have found that the fuzee in that case was discharged against the King's officers: but since they have not found that matter, we are, says he, confined to what they have found positively, and are not to judge the law upon the evidence of a fact, but upon the fact as it is found. Thus also was the resolution of the court in the late case of *The King* and *Huggins, Mich.* 4 *Geo.* 2. *B. R.* [494]

Secondly, Another distinction made was, that it appears by the indictment that *Palmer* was convicted by verdict in the same county in which the offence of the accessary is charged to have been committed; and the law presumes notice to all in the same county, but not in a foreign county. For this *Fitzherbert*, tit. *Corone Pl.* 377. *Stamf.* 41. *b*, and *Hale's P. C.* 218. were cited.

Answer. The note in *Fitzh.* is mentioned to be in *Hilary*

Term, 12 *Ed.* 2.: but I cannot find any such case or opinion in *Maynard's Year Book* of that term; besides, it is a very loose note, and scarcely intelligible. ——— *Nota*, That if "a man is indicted of a rescue of a person outlawed in the "same county, he shall lose life and member; otherwise, if in "another county." Nothing is here said of *notice;* and, taken generally, the passage is certainly not law: but suppose this to be loosely said in one or two books, yet it is a harsh doctrine, and I cannot find any judgment founded upon it. Nay, it is strange, how such a distinction could be made at common law upon the point of *knowledge* in the accessary; because, before the statute of 2 & 3 *Edw.* 6. *c.* 24. was made, any person, who in one county received a felon that had committed a felony in another county, could not be punished at all for want of trial, and consequently the sufficiency of *notice* could at that time never come in question in such a case.

And therefore my Lord *Hale*, though he sets it down as the opinion of some others, yet gives his own opinion to the contrary. The whole paragraph runs thus:—"Every re- "ceipt to make an accessary must be, *knowing him to be* [495] "*such:* but if a man be attaint of felony in the county of *A.* "the law *presumes* notice thereof in the same county; "therefore the receipt of him in the same county *seems* ac- "cessary; *contra*, if in another county. *Videtur cognitio* "*requisita in utroque.*" And I take these latter words to be his (*a*) own sentiment. I have seen a manuscript note of a very learned Judge upon this passage in *Hale's P. C.* in the following words:—"*Mes semble que tiel legal notice* "*n'est sufficient à faire un criminal, coment soit sufficient à* "*rendre luy responsible in matter civil: coment est doubt in* "*ceo:* issint il n'est accessary sans actual notice." See also *Dalton*, (last edit.) 530. *Stamf.* 96.

(*a*) See the passage transcribed from the Lord Hale's History of the Common Pleas of the Crown, inserted by way of note in the Reporter's argument, ant' 466, 7.

Mr. *Lambard*, in his *Justice of Peace*, hath this passage, *p.* 293. "There is some opinion, that a man shall be an "accessary for receiving a felon attainted, (especially in the "same county) though he know not of the attainder at all; "for every man, say they, is bound to take knowledge of a "matter of record, at least in the same, though not in a "foreign county. But *Bracton* very reasonably requires *a* "*right and direct knowledge* in the parties to make them "accessary, as well in the one case as the other; for albeit a

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"record, and especially the pronunciation of an outlawry, be "so notorious, that every man may easily come to know the "same, yet were it an *over great extremity* that each man "should, upon *the peril of his own life*, inform himself, and "take understanding of it."

[496] In an indictment against one as accessary after the fact to a felony by receiving, &c. the principal, who was outlawed, or attainted in the same county, it ought to appear, that the party receiving, &c. did it sciens or scienter; otherwise it will not amount to an absolute legal presumption. so as to excuse such omission.

This reasoning of Mr. *Lambard* appears to be very judicious; and upon the whole of this point we all think, that the true way of understanding these books is, that an outlawry or attainder in a particular county may, as the case may happen to be circumstanced, be *some evidence* to a jury of notice to an accessary in the same county; but that it cannot, with any reason or justice, create an *absolute legal presumption of notice*, so as to excuse the not charging the fact to be done *sciens* or *scienter* in the indictment, as it is here.

Besides, if this could be so, the fact charged in this indictment to be done by the prisoner, is, in strictness, not charged to be done in the county of *Somerset*, where the conviction was: it is laid, that after the judgment of transportation *Palmer* was committed to the custody of the keeper of his Majesty's gaol at *Ivelchester, in the said county*, there to remain until he should be transported; and that afterwards, to wit, on such a day, *Thomas Burridge*, at *Ivelchester aforesaid*, (without saying in the said county) wilfully and feloniously aided and assisted him to escape out of the said gaol.

In criminal cases, though the county be in the margin, yet the place where the fact is supposed to be done must in the indictment be laid to be in com' prædict'; otherwise in civil cases.

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Now it is not laid, that this fact of *aiding and assisting* was done with force, nor that *Burridge* was *present at the escape;* and therefore the aid and assistance might be afforded in a different county, and we cannot take notice that the whole township or vill of *Ivelchester* is in the county of *Somerset*, 1 *Sid.* 345, *Parker* v. *Ladd, in assumpsit, Salop* was in the* margin, and the declaration set forth the promise to be made *apud Salop*, without saying *prædict'*, or in *com' prædict'*, which the court held to be well enough in a declaration, and that the form in the Common Pleas is always so, but declared that it would clearly be ill in criminal cases, *Paschæ*, 12 *W.* 3. *B. R. Rex* v. *Fossett*, it was held that in an indictment, if the county is in the margin, and the place where the fact is supposed to have been committed is not said to be in *com' præd'*, it is ill, but that it would be good in a declaration.

Thirdly, Another exception was, that it is not alleged that

Palmer was in prison for the *same felony* whereof he was convicted, or for *any felony* at the time the prisoner at the bar assisted him to make his escape.

The answer given to this was, that in the special verdict it is found that the prisoner did wilfully aid and assist *William Palmer, so being in custody as aforesaid,* to escape out of the said gaol.

But, as I said before, the finding of the jury will not aid the indictment, and therefore this is no answer; and we all think that for this omission the charge is uncertain; for it may be true, that, in *January*, *Palmer* was committed upon the judgment of transportation, and in *October* following (as it is here laid) the prisoner at the bar might assist him to escape, and yet he might have been legally discharged, and again committed for another matter, as in trespass, &c. in the mean time. In *Dyer* 164. *b.* which I mentioned before, it is laid that the officer *cepit et arrestavit* the prisoner, *et ipsum in salvâ suâ custodiâ adtunc et ibidem habuit et custodivit, quousque* the defendants *ipsum e custod' prædict' felonicè ceperunt et rescusser'.*

Another exception was taken to this indictment for want of being laid *vi et armis.* [498]

The answer to which was, that it is aided by the statute of 37 *H.* 8. *c.* 8.; but the cases upon this are so various, and disagree so much, whether the want of *vi et armis,* or only of the words, *viz. gladiis, baculis, et cultellis,* which was the ancient form, are aided by that statute; and it is a point of so great consequence, that we think it more proper to decline giving an opinion upon it, till a case shall happen wherein it shall be necessary to be determined; for at present we are of opinion, that, upon the other exceptions before mentioned, the indictment is insufficient in law, and judgment cannot be given upon it against the prisoner.

Quære whether the want of vi et armis, or only of the words gladiis, baculis et cultellis, be by the statute of 37 H. 8. c. 8. aided in indictments of this nature.

This, being the opinion of the court, gives rise to a subsequent consideration, what judgment ought to be given for the prisoner, whether to discharge him of this indictment, or to quash it? And we are all agreed that judgment ought to be given to discharge the prisoner from this indictment.

I can find but one case wherein it was done otherwise, and that was *The King* v. *Keites, Hil.* 8 *W.* 3. *B. R.* 5 *Mod.* 287. *Skin.* 666. At the gaol delivery for the county of *Wilts,* Mr. *Keites* was indicted of murder at common law,

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and also on the statute of stabbing, for killing his servant; and a special verdict was found, which being removed into this court, the question was, whether the fact amounted to murder, or only manslaughter? After two arguments, the court thought the special verdict was so uncertain and imperfect, that no judgment could be given upon it; and a doubt seems to have arisen, whether a *venire facias de novo* could

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be awarded in a capital case. To avoid this question, my Lord Chief Justice *Holt* himself on the last day of the term took several exceptions to both the indictments, for which a rule was made that they should be quashed. I have caused a search to be made, and no judgment is entered on the record; but I have found the rule in the office book, and the prisoner was bailed to appear at the next assizes. This passed on the last day of the term; and I do not find by my manuscript report of the case, which was taken by a very learned hand, that any opposition was made by either side to the quashing of the indictment. The ground the court went upon seems to have been that *Keites* was certainly found guilty of felony in killing a man: but what kind of felony it was, whether murder, or an aggravated manslaughter, was uncertain; and therefore it was fit to be left open to some method of re-examination.

Where the indictment has not well charged a felony, nor the special verdict certainly found any upon the facts therein stated, and consequently it is uncertain whether the prisoner be guilty of any felony at all, or only of a misdemeanor; or where in such case the prisoner demurs to the indictment, and the Attorney-General joins in demurrer whereon the matter in law is argued; or where the jury has found a general verdict that the prisoner is guilty, and afterwards judgment is arrested for defects in the indictment; in all these cases the judgment given must be a judgment of acquittal: but this will be no bar to another indictment constituting a different offence.

But the present case *differs materially;* for as this indictment has not *well charged* a felony, so the special verdict has not *certainly* found any upon the facts therein stated; and therefore it is totally *uncertain* whether the prisoner at the bar be guilty of any felony at all, or only of a misdemeanor. Suppose the prisoner had demurred to this indictment, and the king's attorney had joined in demurrer, and the matter of law had been argued, the judgment given thereupon must have been a judgment of acquittal. So, I apprehend it would have been, if the jury had found a general verdict that he was guilty, and afterwards the judgment had been arrested for defects in the indictment. And the like reason does in justice hold here.

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From hence no inconvenience can arise; for this judgment can only go to the fact here charged: but will be no bar to

a new indictment containing a fact *so described*, and charged with such circumstances as to constitute a different offence. Therefore upon the whole matter judgment must be entered for the prisoner, and he must be discharged from this indictment.

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Note; at the prayer of the king's counsel, the return to the *habeas corpus* was read, whereby it appeared that the prisoner stood likewise charged with a commitment by a justice of peace to *Ivelchester* gaol for a misdemeanor; of which he had confessed himself guilty before the justice; he was therefore remanded back to *Newgate*, to be there kept in safe custody until he should be from thence discharged by due course of law. After which the prisoner was indicted anew at the next assises held for the county of *Somerset*; and being convicted on such indictment, was transported for seven years.

The indictment on which the prisoner was tried a second time, being settled by advice of counsel, was as follows:—

Somersetshire. THE jurors for our sovereign lord the king, upon their oath present, that heretofore, that is to say, at the general quarter sessions of the peace of our sovereign lord the king, held at *Wells*, in and for the county of *Somerset*, upon *Tuesday* (to wit) the eleventh day of *January*, in the fifth year of the reign of our sovereign lord *George* the second, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and thirty-one, before *Thomas Carew*, Esq., *James Strode*, Esq., *Thomas Coward*, Esq., *Richard Comes*, Esq., *William Long*, Esq., *Joseph Brown*, Esq., *William Churchey*, Esq., *William Jones*, Esq., *Thomas Palmer*, Esq., *Adam Martin*, Esq., *Philip Sydenham*, Esq., and others their fellows, justices assigned to keep the peace of our said lord the king in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, and so forth, by the oath of *Thomas Cooke*, *Gabriel Pyleaffe*, *Henry Guy*, *William Counsel*, *John Linthorn*, *Henry Cosens*, *Thomas Sampson*, *Thomas Perry*, *Edward Cox*, *Thomas Pulmore*, *Henry Woolford*, *John West*, *James Moore*, *Israel Gliston*, *William Wear*, *Henry Fisher*, *Richard Bagg*, *Joseph Bernard*, [501]

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Richard Knowles, *Thomas Davison*, *William Selway*, and *John Bath*, gentlemen, good and lawful men of the county aforesaid, impanelled, sworn, and charged to inquire for our said lord the king, for the body of the county aforesaid, it was presented, that *William Palmer*, of *Overstowey*, in the county of *Somerset*, labourer, on the twelfth day of *November*, in the fifth year of the reign of our sovereign lord *George* the second, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and so forth, with force and arms, and so forth, at *Overstowey* aforesaid, one ewe sheep of the value of six shillings, of the goods and chattels of a person unknown, then and there being found, then and there feloniously did steal, take and carry away, against the peace of our now said lord the king, his crown and dignity, and so forth.

And the jurors aforesaid, now sworn here upon their said oath further present, that at the same general quarter-sessions of the peace of our said lord the king, held at *Wells*, in and for the said county of *Somerset*, upon *Tuesday* the eleventh
[502] day of *January*, in the fifth year aforesaid, the aforesaid *William Palmer*, was duly tried and convicted of the felony above mentioned, charged upon him as aforesaid; and that it was then and there adjudged by the same court, that the said *William Palmer* should be transported for the space of seven years, according to the form of the statutes, as by the record thereof and proceedings remaining amongst the records of the general quarter-sessions of the peace of the said county of *Somerset*, at *Wells*, in the county aforesaid, it doth more fully appear.

And the jurors aforesaid, now sworn here, upon their said oath further say, that the aforesaid *William Palmer*, being so as aforesaid tried and convicted of the said felony, was then and there (to wit) at the same general quarter-sessions of the peace of our said lord the king, held at *Wells*, in and for the county aforesaid, upon *Tuesday* the said eleventh day of *January*, in the fifth year aforesaid, committed by the same court to his majesty's gaol at *Ivelchester*, in the county aforesaid, upon and in execution of the said judgment for the felony aforesaid.

And the jurors aforesaid, now sworn here, upon their said oath further present, that *Thomas Burridge*, late of *Chard*, in the county of *Somerset*, tailor, being a prisoner in his

majesty's gaol at *Ivelchester* aforesaid, in the county aforesaid, on the thirteenth day of *October*, in the sixth year of the reign of our said sovereign lord king *George* the Second, and well *knowing that the aforesaid* William Palmer, *then also a prisoner in the said gaol, had been convicted of and committed to the said gaol, in execution of and for the felony aforesaid, and did then and there remain so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid,* afterwards, that is to say, on the same thirteenth day of *October*, in the sixth year of his said majesty's reign aforesaid, with force and arms at *Ivelchester* aforesaid, *in the county aforesaid,* did wilfully and feloniously *rescue the said* William *Palmer, then and there being in the said gaol so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid,* from and out of the said gaol, so that he the said *William Palmer* did make his escape out of the said gaol, and then and there did wilfully and feloniously aid and assist the said *William Palmer*, then and there being in the said gaol so convicted and committed upon and in execution of the said judgment for the said felony as aforesaid, in making his escape out of the said gaol; and that the said *William Palmer*, by the aid and assistance of him the said *Thomas Burridge*, did then and there make his escape from and out of the said gaol, and go at large, to wit, at *Ivelchester* aforesaid, *in the county aforesaid.*

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And the jurors aforesaid, now sworn here, upon their said oath further say, that the said *Thomas Burridge*, being a prisoner in his majesty's said gaol at *Ivelchester* aforesaid, in the county aforesaid, on the said thirteenth day of *October*, in the said sixth year of the reign of his said majesty our sovereign lord king *George* the Second as aforesaid, afterwards, that is to say, on the same thirteenth day of *October*, in the sixth year of his said majesty's reign aforesaid, with force and arms at *Ivelchester* aforesaid, in the county aforesaid, did wilfully and feloniously *break the said gaol*, and *rescue* the said *William Palmer*, then and there being in the said gaol so convicted and committed *upon and in execution of the said judgment*, for the said felony as aforesaid, from and out of the said gaol, so that he the said *William Palmer* did make his escape out of the said gaol, and then and there did wilfully and feloniously

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aid and assist the said *William Palmer*, then and there being in the said gaol, so convicted and committed upon and in execution of the said judgment, for the said felony as aforesaid, in making his escape out of the said gaol, and that the said *William Palmer*, by the aid and assistance of him the said *Thomas Burridge*, did then and there make his escape from and out of the said gaol, and go at large, to wit, at *Ivelchester* aforesaid, in the county aforesaid, against the peace of our said lord the king, his crown and dignity.

A

TABLE

OF

THE PRINCIPAL MATTERS

CONTAINED

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A.

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WHERE a bill wants proper parties, it is in the power of the court to dismiss the bill without prejudice, or to give leave to amend on payment of costs. I. 428

On a bill brought by a bankrupt against the defendant his supposed debtor for an account, the assignees under the commission were charged in a proper manner, but the prayer of process was only against the defendant; a good plea in abatement that the assignees were not made parties. I. 593

A commission being granted to examine witnesses at *Algiers*, the plaintiff died, by which, in strictness, the suit abated, but the witnesses were examined there before notice of the plaintiff's death; the examination held regular, though one of the witnesses was yet living. III. 195

See tit. EXAMINATION.

If the defendant's time for answering be out, the court will order proceedings to be revived. So though the defendant by his answer insists that the plaintiff is not entitled to revive; for this ought to be shewn either by plea or demurrer: but if in such case it appears at the hearing, that the plaintiff had no title to revive, he cannot have a decree. III. 348

See ANSWER, PLEA AND DEMURRER.

ABEYANCE.

The reason why an estate is said to be in abeyance. I. 516

In case of a will, where the remainder is devised in contingency, the reversion in fee is not in abeyance in the mean while, but descends to the heir. *ibid.*

Though the freehold of lands cannot be

kept in abeyance, but must vest in somebody, yet there is no such rule with regard to personal estates, which may remain in suspence, and wait till a contingency happens. III. 305

Lands are devised to *A.* and *B.*, and the heirs of the survivor, in trust to sell; though the inheritance be in abeyance, yet the trustees by a fine may make a good title by estoppel. III. 372

ABJURATION.

The nature and consequences of abjuration by the ancient common law. Protestant dissenters made liable thereto, by 35 *Eliz. cap.* 1. *sect.* 2.; but exempted from them by the toleration act, or 1 *W.* & *M. st.* 1. *cap.* 18. III. 38, 39 (N)

ACCESSARY.

There may be an accessary to an accessary before the fact, but not to an accessary after the fact. III. 475

See more under title PRINCIPAL AND ACCESSARY.

ACCIDENTS.

See CASUALTIES.

ACCOUNT.

Where an executor has an express legacy, the Court of Chancery looks upon him but as a trustee; and will make him account for the surplus, though the spiritual court has no such power. I. 7

Captain of a ship dies leaving money on board, intended to be improved in trade, the mate becomes captain, and improves the money, he is liable to account for the profits and not for the interest only. I. 140

In an account both parties are actors. I. 263

And may revive. I. 743

A. is a goldsmith, and there is mutual credit betwixt *A.* and *B.*, and *A.* becomes a bankrupt, only the balance shall be liable to the bankruptcy; neither is it material whether the mutual credit be by open account, or mutual stated debts. I. 325

If after a decree to account an executor or administrator does not revive within six years, this is not within the statute of limitations. I. 742

Where the child of a freeman of *London* is to make his election whether he will abide by the will or by the custom, he is not obliged to elect until after the account taken. III. 124(N)

In a decree of foreclosure against an infant, though the infant has six months after he comes of age to shew cause, &c. yet he cannot ravel into the account, nor even redeem, but only shew an error in the decree. III. 352

Account of Profits from what time, where from the Title accruing, and where from the filing the Bill only.

Where one is in possession of lands belonging to an infant, if the infant when of age makes out his title, he shall recover the profits in equity from the first accruing of his title, and not from the filing of his bill only. II. 645

So the defendant shall account for the profits from the time the plaintiff's title accrued, and not from the filing the bill only, if the defendant has concealed the deeds and writings making out the plaintiff's title. II. 645

ACTION OR SUIT.

Debt against the sheriff for an escape of one in execution, on an outlawry after judgment, may be brought either in the *tam quam* or at the suit of the party only. I. 687

A *scire facias* is not in nature of a new action, but a continuation only of the old one. III. 148

Where the plaintiff has first brought his action at law against the defendant, and has bail, the Court of Chancery will not grant a *ne exeat regnum*. III. 314 (N)

ACTION, CHOSE EN.

See ASSIGNMENT, BARON AND FEME.

ADEMPTION OF A LEGACY.

See LEGACY.

ADMINISTRATION AND ADMINISTRATOR.

An administrator since the statute of *Edw.* 3. and before that of *Car.* 2. had all the power of an executor, and consequently was not compellable to make distribution amongst the next of kin, but the latter of these statutes directs a distribution. I. 8, 49

One dies intestate leaving an aunt and a grandmother, the latter is nearer of kin than the aunt, and entitled to administration. I. 41

Administration committed, though contrary to the statute of *H.* 8., is not void, but voidable. I. 43

An administration granted by the archdeacon or ordinary, where there are *bona notabilia* in divers dioceses, is merely void. I. 767

A bastard dies intestate without wife or issue, and leaving a personal estate; the king is entitled, and the ordinary of course grants administration to the patentee of the crown. III. 33

A church lease for three lives is granted to a bastard and his heirs, who dies without issue, and intestate; what shall become of this lease? III. 33, 34 (N)

An administration is granted during the minority of four infant children, one of whom being a daughter, marries an husband who is of age; the administration is not determined. III. 81

So where an infant executrix being under seventeen, administration is granted, and the infant marries an husband of age: this does not determine the administration, by the opinion of the Lord *King*, Chancellor, and *Raymond*, Ch. J. contrary to the opinion in 5 *Co.* 29. which seems to have been extrajudicial, and is not taken notice of by contemporary reporters. III. 88

So if administration be granted during the minority of four infants, and one dies; this does not determine the administration, contrary to the opinion in 5 *Co. Brudenell's* case. III. 89

In a bill for an account of the personal estate of *J. S.*, though the person who has a right to administer to *J. S.* be a party, yet this is not sufficient without administration actually taken out. III. 349

One sues as administrator to *J. S.* without shewing that *J. S.* died intestate; yet an administration taken out of the Archbishop's court shall be intended to be a good administration. III. 370

Administration granted in a foreign court (as in *Paris*) not taken notice of in our courts. III. 371

A. owes money by several judgments and bonds, and dies intestate; his administrator pays the judgments and some of the bonds, and pays more than the personal estate amounts to; what the administrator paid on the judgments must be allowed him: but as to what he paid on the bonds, he must come in *pro ratâ* with the other bond creditors. III. 400

And see title EXECUTOR AND ADMINISTRATOR.

ADVANCEMENT.

A. having seven children, makes an executor in trust, and devises to each child one 7th of his personal estate; one of the children dies in *A.*'s lifetime, and one of the six surviving children has been advanced by the father in his lifetime; yet this child shall take his full share of the 7th part, without bringing what he had before received into hotchpot. III. 124

The father is the only judge of what is a proper advancement for his child. III. 285

Inconsiderable sums occasionally given to a child not to be deemed an advancement, or any part thereof. Thus maintenance money, or an allowance made by a freeman to his son at the university, is not to be taken as any part of the child's advancement; nor putting out a child apprentice: but the father buying an office for his son, though but at will, as a gentleman pensioner's place, or a commission in the army, these are advancements *pro tanto*. III. 317 (N)

Vide *Resulting trust, &c.* under title TRUST, also title LONDON, CUSTOM OF.

ADULTERY.

Where the wife sues the husband for a specific performance of her marriage articles, and that he may settle such and such lands upon her in jointure, it is no bar to her demand, that she has eloped with an adulterer; much less if this be not by the husband put in issue in the cause. III. 269

An instance where the reconciliation by the husband after the wife's going away with the adulterer was specially pleaded, and the plea allowed. III. 273 (N)

Why a husband does not forfeit his tenancy by the curtesy on leaving his wife, and living in adultery, as a wife forfeits her dower by elopement, &c. III. 276

ADVOWSON.

An advowson descending to an heir is real assets, and (as it seems) extendible in an *Elegit*. III. 401

See PRESENTATION.

AFFIDAVIT OR OATH.

Bill will not lie to perpetuate testimony, &c. before trial, unless affidavit be made of the witnesses being infirm and unable to travel. I. 117

A peer of the realm is to put in his answer upon honour, but his answer to interrogatories and examination as a witness must be upon oath. I. 146

Where in an inferior court I am sued for a matter out of the jurisdiction, if in vacation time, a prohibition may be had in chancery, on affidavit that the matter is out of the jurisdiction: but no affidavit is necessary where on the face of the declaration the matter appears to be out of the jurisdiction. I. 476

Where a master reports any thing as admitted, by either of the parties, which report is afterwards excepted to; the report must, *primâ facie*, be taken to be true, and requires at least an affidavit to falsify it. III. 142 (N)

Affidavits allowed to be read for a patentee of a new invention, upon a motion to dissolve an injunction, on coming in of the answer. III. 255

A precedent of a *ne exeat regnum* being granted on affidavits, though there was no bill in court whereon to ground the writ. III. 313 (N)

AGE.

See INFANT, PAROL DEMUR.

AGREEMENT.

On casualties happening between the articles for a purchase and the sealing of the conveyance, who shall bear the loss. I. 61

One articling to leave his wife 1000*l.* within three months after his death, cannot be enforced in equity to amend the security. I. 107, 460

Where money is agreed to be laid out in land, the party, who would have the sole interest in the land when bought, may (if of age) have the money paid to him. I. 130

But a person entitled only to an estate tail in the land shall not have the money, because of the remainderman's chance. I. 471

One settles lands on marriage on himself and wife, and first son, &c. and makes over bankers assignments on the same trusts, and if the annuities are redeemed, the money to be invested in land, and settled to the same uses; these annuities shall go to the heir, and not to the executor. I. 205

One agrees for a valuable consideration to convey lands to *J. S.*, and afterwards confesses a judgment to *J. N.*, if the consideration money paid by *J. S.* be any-ways adequate to the value of the land, it binds the land in equity, and shall defeat the judgment; *secus*, of a mortgage, or if the consideration were not adequate. I. 277

One agrees before marriage to settle certain lands on his wife for life, and afterwards devises these lands for payment of his debts, the covenant is a specific lien on the lands; *secus*, had it been only an agreement to settle so

much *per annum*, without mentioning any lands in certain. I. 429

A bill in equity will not lie for a specific performance of an agreement to transfer *South-sea* stock; *secus*, where the thing contracted for may be particularly commodious to the party. I. 570

Vide infra, *where an agreement is to be performed in* specie, *and where not.*

One for a valuable consideration contracts to become a freeman of *London*, but dies before he has taken it up; his personal estate shall be divided as if he had been a freeman, but his children not to be city orphans. I. 710

A. articles to buy land, and pays part of the purchase money, afterwards he enters into several orders of court to pay the residue by such a day, or in default thereof to give up the articles, and lose what he had before paid; court will relieve, though these articles have not been complied with. II. 66

Money covenanted to be laid out in land shall descend as land: but he that would be entitled to the fee of the land when purchased, may dispose of it by a will, though not attested by three witnesses; also a parol direction for the payment of it seems to be good: so if money is ordered or devised to be laid out in land and settled, to the use of *A.* in tail, remainder to himself in fee, equity will order the money to *A. Secus*, if the remainder thereof be limited to a third person; also, though by a voluntary contract money is agreed to be laid out in land, the court will execute such agreement in favour of the heir. II. 171

Two article, that whatever *J. S.* shall leave to either of them shall be equally divided betwixt both; such agreement good, and shall be carried into execution by this court; also if after this one of them contrives that *J. S.* shall leave part of his estate to a third person, in trust for him, this is within the articles. II. 182

It is against natural justice that any one should pay for a bargain which he cannot have; as if I article to buy a house, and the house is burnt down before the day of payment, I am not bound to pay the money. II. 220

The plaintiff's house being so near the church that the ringing of the five o'clock bell in the morning disturbed her; the plaintiff came to an agreement in writing with the churchwardens and inhabitants at a vestry, that she would erect a cupola and clock at the church, in consideration of which the bell was not to be rung in the morning; this a good agreement, and decreed to be binding in equity. II. 266

Where one articles to sell an estate, and brings a bill for an execution of the agreement, though at the time of the agreement he cannot make a title to the purchaser, it is sufficient if he is able to do so when the decree or report is made. II. 630

See title LONDON.

One articles to buy land, and the title is under a will not proved in equity against the heir; yet in some cases equity will compel the purchaser to accept the title. III. 190

Money agreed to be laid out in land shall be taken as land, and go to the heir; and no difference where the money thus agreed to be laid out and settled, is deposited in the hands of trustees, and where it remains in the hands of the covenantor; the agreement binding in both cases, and making it as land. III. 211

Whatever for a valuable consideration is covenanted to be done shall, in equity, be looked on as done: thus money agreed to be laid out in land shall be taken as land; *et è converso.* III. 215

A.'s father articles with a carpenter to pay him 1000*l.* to build a house on his estate; the carpenter covenants to build it, *A.* dies; the heir of *A.* shall compel the building of the house, and the executor to pay for it. III. 223

Though by a deed 5*l. per cent. per ann.* was agreed to be allowed, yet it appearing that the money had been

placed in the government funds, which yielded but 4*l. per cent.*, the court reduced the interest to 4*l. per cent.* III. 227

30,000*l.* is covenanted to be laid out in land; the money need not be laid out altogether upon one purchase, but if laid out at several times it is sufficient; and if the covenantor dies, having after the covenant purchased some lands which are left to descend, this will be a satisfaction *pro tanto.* III. 228

An agreement was signed by the parties, and by consent made an order of court, to submit to such decree as the court should make, and neither party to bring his appeal: yet the cause was allowed to be reheard. III. 242

An executor in trust, who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused, but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship, and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust money in their hands; the court disallowed the demand. III. 251, 252 (N)

An attorney, on behalf of his client the defendant, promises to pay 500*l.* to the plaintiff; this being done by the authority of the client, the attorney is not liable, but only the client. *Secus*, if the attorney had no authority from his client to make this engagement. III. 277

Brokers or factors, who act [or agree] for their principals, not liable in their own capacities. III. 279

A trust estate was decreed to be sold for the payment of debts and legacies, and to be sold to the best purchaser. *A.* articles to buy the estate of the trustees, and brings a bill to compel them to perform the contract. The trustees by their answer disclose the matter; the court will make no new decree, but leave the former decree to be pursued. III. 282

Agreement parol, Statute of Frauds and Perjuries.

An agreement made by the husband before marriage, without writing, that the wife's estate should be all of it enjoyed by her to her separate use, is within the statute of frauds. I. 618

One alters a draught with his own hand, this is not a signing to take it out of the statute of frauds, though the seller afterwards executes the conveyance and (the estate being in *Middlesex*) causes it to be registered. I. 770

A letter from a father to his daughter, by which he agrees to give her 3000*l.* portion, and this not shewn to the man who afterwards marries her, does not take the promise out of the statute of frauds. II. 65

The Judges equally divided on this question, whether a contract for stock be within the statute of frauds, which mentions goods, wares, and merchandizes, so as to require the contract to be in writing, or earnest money to be paid. II. 308

Agreement underhand.

The father covenants to settle an estate on the marriage of his son, who privately agrees to pay so much out of it to the father; the heir being in such case under the awe of his parent, and supposed not to act freely, equity will relieve against this private agreement. I. 121

A son on his marriage is to have 3000*l.* portion with his wife, and privately and without notice to his parents, who treated for the marriage, gives a bond to the wife's father to pay back 1000*l.* of the portion seven years afterwards; this bond void in equity, and will not be made better by being assigned to creditors. I. 496

If on the consent of a wife and her trustees, and in order to a composition with the husband's creditors, the court orders part of the trust-money to be paid to the creditors, they consenting to discharge him of the debts; any private notes, &c. taken by any of the creditors for part of their debts,

beyond their share with the rest of the creditors, will be set aside. I. 768

See more under title *Marriage brocage bonds.*

Underhand Agreement, in what Case the Court refused to set one aside.

A. treated for the marriage of his son; and in the settlement on the son, there was ap ower reserved to the father to jointure any wife whom he should marry, in 200*l.* *per annum*, paying 1000*l.* to the son. The father treating about marrying a second wife, the son agreed with the second wife's relations to release the 1000*l.*, and did release it; but took a private bond from the father for the payment of this 1000*l.* Equity would not set aside this bond, because it would be injurious to the first marriage, which being prior in time was to be preferred. III. 66

Agreement when to be performed in specie, *and when not.*

By a settlement *A.* is made tenant for life, remainder to the heirs of his body by his wife, and in the same deed *A.* covenants not to suffer a recovery, but that the lands shall be enjoyed according to those limitations; afterwards *A.* suffers a recovery and devises these lands; on a bill brought for a specific performance of the covenant, it was decreed that the lands devised were not affected, though the covenant was good to bind the assets; and such covenant being at first accepted, equity ought not to vary or alter it. I. 107

See also I. 461

A bill in equity will not lie for a specific performance of an agreement to transfer *South-sea* stock. I. 570

On a bill to compel a performance of an agreement for transferring 5000*l.* *York-Buildings* stock at 7*l.* 5*s.* *per cent.* defendant demurred, but demurrer over-ruled; for the case might be attended with such circumstances as would make it just to decree a specific performance of the parties own agreement, or at least to pay the difference. II. 304

A man having seduced an innocent woman by whom he has a bastard, gives her a writing obliging himself to pay 2000*l.* after his death for the purchasing an annuity for the woman and child for their lives; the man dies; equity will compel a performance of the agreement. II. 433

Covenant in consideration of marriage, to settle lands of 350*l.* *per annum* on husband and wife and the issue male of the marriage, remainder to the brothers of the husband; equity will compel a specific execution of this covenant, and not put the party to an action of covenant in the trustee's name. II. 594

A bill lies to compel a specific performance of an award, where the party submitting has received the money, in consideration whereof he is to convey the estate sued for. III. 187

Where the husband, for a valuable consideration, covenants that his wife shall join with him in a fine; this court will enforce a performance of such covenant. III. 189

Quære, If it appears to be impossible for the husband to procure the concurrence of his wife. *ibid.* (N)

Difference between awards to pay money, and to do any thing collateral; and why a bill in equity may be proper only to compel a [specific] performance of the latter. III. 190

A bill in equity lies not to compel a specific performance of an agreement to pay money in consideration of having stifled a prosecution for felony; *secus*, if to stop a prosecution at law for a fraud. III. 279

Agreement on Marriage.

In marriage articles to settle lands on the husband for life, remainder to the heirs or heirs male of his body, a court of equity will decree the conveyance to be made in strict settlement according to the intent of the parties, *(viz.)* to the husband for life, remainder to the first and every other son in tail, &c. and not direct an estate-

tail to the husband, according to the legal operation of the words. I. 106, 143, 291, 622.

Articles and a settlement mentioned to be made in pursuance thereof were both made before marriage, but the settlement varied from the uses in the articles; decreed to go according to the articles. I. 123

An agreement on marriage articles to convey to the husband a third part of what shall come to the father of the wife on the death of his father, good, and equity will compel an execution. II. 191

Feme gives a bond to her intended husband, that in case of their marriage she will convey her lands to him in fee; they intermarry, the wife dies without issue, and then the husband dies; the bond, though void in law, is yet good evidence of the agreement in equity, and the heir of the husband shall compel a specific performance against the heir of the wife. II. 243

A feme infant seised in fee, on marriage with the consent of her guardians, covenants in consideration of a settlement to convey her inheritance to her husband; if this is done in consideration of a competent settlement, equity will execute the agreement, though no action would lie at law to recover damages. II. 244

Father and son on the marriage of the son article to settle lands on the intended husband for life, remainder to the wife for life, remainder to the issue male of the nephew, remainder to the nephew in fee; on the death of the husband and wife without issue, the nephew shall compel a specific performance of the covenant. II. 245

Articles on marriage to settle lands on husband and wife for their lives, remainder to the heirs male of the body of the husband by the wife, remainder to the heirs male of the body of the husband by any other wife, remainder to the *heirs female* of the body of the husband by this wife; a settlement is made before the marriage, and said to be pursuant to the articles, whereby the lands are limited to the husband for life, *sans* waste, and with power to make leases, remainder to the first, &c. son of the marriage in tail male, remainder to the first, &c. son of any other marriage in tail male, remainder to the heirs of the body of the husband; there are issue two daughters, and the husband suffers a recovery, and devises the premisses to his sister; the daughters may in equity compel the devisee to convey the premisses to them. II. 349

A widow of a freeman of *London*, who left children and died intestate, was entitled to four-ninths of his personal estate, and having by deed assigned over her four-ninths for her separate use in case of marriage, and to such persons as she should appoint, and for want of such appointment, then to her children; the widow intending to marry a second husband, by another deed, to which the husband was party, in consideration of the intended marriage, and of a settlement made on her by him, recites, that if she did not dispose of her four-ninths, the husband would be entitled thereto; and then assigns it over to trustees, in trust for the intended husband during their joint lives, subject to her control and disposal by writing, after which she dies without disposing of it; decreed the second husband is as a purchaser, and the recital, that he would be entitled to it if the wife should not dispose of it, was a gift. II. 533

Articles on marriage to settle lands on the husband and wife for their lives, remainder to the first, &c. son of the marriage, remainder to the heirs male of the body of the husband by any wife, remainder to the heirs of the body of the husband by the first wife, remainder to the husband in fee, with provisions for the daughters of that marriage, if no son; the husband has one daughter by the first wife, suffers a recovery, and marries a second wife, taking notice of his first marriage articles in his second settlement; he being tenant in tail by the articles was allowed by his recovery to have barred his daughter by the first marriage. II. 535

In marriage articles there is a diversity between a limitation to the heirs of the body of a man, and to the heirs female of the body of the man; and sons more favoured than daughters. II. 539

One, in consideration of marriage and of 500*l.* portion which he is to have with his wife, by settlement empowers his wife to dispose of 200*l.* by her will; they live together fifteen years, the wife gives the 200*l.* away by her will; the husband, at this distance of time, shall not be admitted to say he had not 500*l.* with his wife, but shall pay the money. II. 618

A settlement or jointure on a marriage, though made very unequally and in favour of the wife, will not be set aside in equity, for that the court cannot put the wife *in statu quo.* II. 619

By marriage articles money is agreed to be invested in a purchase, and settled on *A.* in tail, remainder to *A.* in fee. *A.* has neither wife nor issue, and might by a fine only dispose of the lands if settled; yet the court (the Lord *King*) would not order the money to be paid to *A.*; *à fortiori* he would not, if there were either wife or issue. III. 13

But note: This appears to be contrary to the opinion of the Lord *Macclesfield*, and also to the present practice. III. 14 (N)

A. covenanted on his marriage to lay out 3000*l.* in the purchase of land, and to settle it on himself in tail, remainder to *B.* *A.* purchased the manor of *D.* with this 3000*l.*, and never settled it, but suffered a recovery thereof; as the covenant was a lien on the land, so the recovery suffered thereof discharged the lien, and barred *B.* of the benefit of the covenant and the remainder. III. 171

The father tenant for life, remainder to the son in tail, with remainder over. The son is an infant, and on an advantageous match being proposed for the son, the father and infant son join in marriage articles, and the father only covenants, that within a year after the son's coming of age, the father and son will join in a fine and recovery of the family estate to several uses. The infant son seals the deed, and within a year after he comes of age, joins with his father in a fine and recovery, but no deed to lead the uses is to be found; the infant son's sealing these articles not sufficient to declare the uses of the fine and recovery. III. 206

Sir *P. T.* tenant for life, remainder to his son *R. T.* for life, remainder to his first, &c. son in tail. Sir *P. T.* by indenture *tripartite* between himself, his son *R.* and *J. S.* covenants to levy a fine of the premises, but *R.* the son only sealed the deed without joining in any covenant; this no surrender, nor release; nor consequently any destruction of the contingent remainder to the first, &c. son of *R.* III. 210 (N)

1500*l.* in the hands of the wife's trustees, and 500*l.* in the husband's hands, is covenanted to be laid out in land, and settled on the husband for life, remainder to the wife for life, remainder to the first, &c. son, remainder to the daughters, remainder in fee to the husband. They have issue a daughter, the husband dies, soon after which the daughter dies before the purchase made, and then the wife dies; the money shall, as land, go to the heir of the husband. III. 216

So money articled on marriage to be laid out in land, and settled, shall go as land, though the wife be dead without issue. III. 217

Money articled on marriage to be laid out in land, and settled, is not assets even at law. *ibid.*

Money, part of which is the husband's, and other part the wife's, is, on marriage, to be laid out in land, and settled to the husband for life, remainder to the wife for life, remainder to the heirs of their two bodies, and the uses go no further; the heir of the husband shall have the whole. *ibid.*

Where money is, on a marriage, to be laid out in a purchase, and settled to the common uses in a marriage settlement, adding a clause, that the purchase shall be made with the consent of the husband and wife; it makes no diversity, though no consent was

given to any purchase made during the life of the husband and wife: for still the money shall be taken as land. III. 218

Money articled to be laid out in lands, and settled on husband and wife and issue, remainder in fee to the husband, will pass by the devise of a real estate, though the money was never laid out. III. 221

Articles on marriage, whereby money is agreed to be laid out in land, and settled, in default of issue male of the marriage, on the husband's brother, shall, if the husband dies without issue male, and leaving only daughters, be performed in favour of the brother, though they were voluntary, and though the husband might have barred such remainder. III. 223

See *Agreement voluntary*, post.

A. covenants for himself and his heirs, that he will purchase lands, and settle the same on himself for life, remainder to his wife for life, remainder to himself in fee; equity will compel the executor to lay out the money, though the heir is both debtor and creditor. III. 224

30,000*l.* is covenanted to be laid out in land; the money need not be laid out altogether in one purchase, but if laid out at several times, it is sufficient. III. 228

A freeman of *London* compounds with his wife for her customary part before marriage; it shall be taken as if no wife, and the husband shall have one half of the personal estate in his own power, the children the other half. III. 320

Agreement voluntary.

Any voluntary bond is good against the executor, though to be postponed to a simple contract debt. III. 222

Articles on marriage, whereby money is agreed to be laid out in land, and settled, in default of issue male of the marriage, on the husband's brother, shall, if the husband dies without issue male, and leaving only daughters, be performed in favour of the brother, though they were voluntary. III. 223

An husband voluntarily, and after marriage, permits the wife, for her separate use, to make profit of all butter, eggs, pigs, poultry, &c. beyond what is used in the family; out of which the wife saves 100*l.* which the husband borrows, and dies; the court will allow of this agreement to encourage the wife's frugality; and the wife shall come in as creditor for the 100*l.* especially there being no deficiency of assets to pay debts. III. 337

A. having a wife who lived separate from him, afterwards courted and married another woman who knew nothing of the former wife's being alive; but it being discovered to the second wife that the former was alive, *A.* in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee of the second wife to leave her 1000*l.* at his death, and died, not leaving assets to pay his simple contract debts; if this bond had been given immediately after the discovery, and they had parted thereupon, it had been good; whereas being given on the afore-mentioned consideration, it was worse than voluntary, and decreed to be postponed to all the simple contract debts. III. 339

And see title Voluntary.

AMBASSADOR.

See Privilege.

AMENDMENT.

On a bill brought by the next of kin of the testator against an executor for an account of the surplus, the executor answered and waived the benefit of the surplus, by mistake of the law in that point; and though he afterwards proved it to have been the testator's intent that he should have the surplus, yet denied to amend his answer. I. 300

Where a bill wants proper parties, it is in the power of the court to dismiss the bill without prejudice, or to give leave to amend on payment of costs. I. 428

On a demurrer to a bill, if the demurrer be allowed, the plaintiff may amend his bill. *Qu.* II. 300

The original bill is to be first answered: but if the plaintiff, after his cross bill filed, amend his bill, he loses his priority. II. 435

An answer amended after hearing and decree, on affidavit of the solicitor and his clerk that the mistake was in ingrossing the answer from the draught, and the draught produced. II. 427

A deposition of a witness amended after publication. II. 646

Matters arising after filing the bill may be charged by way of amendment as well as supplement. III. 351

A writ of error in no case amendable, and why. III. 315 (N)

ANNUITY.

Where an annuity is payable half-yearly, (*viz.*) at *Lady-day* and *Michaelmas*, and the annuitant dies on *Michaelmas-day*, but after sun-set, his executors shall have the half-year's arrear of such annuity. I. 179

Exchequer annuities mortgaged may be sold upon notice without a foreclosure. I. 261

Where the arrears of an annuity or rent-charge shall carry interest, and from what time. I. 541

One devises an house to his cousin, directing that an annuity of 120*l. per annum* shall be paid to her, and that she shall maintain her son there; the son chooses to go from her, still the cousin shall have her annuity in the same manner as if the son had died. I. 604

One by will gives an annuity out of his personal estate; if the executor has misbehaved himself, the court will order part of the personal estate to be set aside to secure this annuity. II. 163

One devises that his executors shall sell his lands, and invest the money in purchasing an annuity for *J. S.*, the testator dies; and the annuitant dies three months after the testator, yet the administrator of the annuitant shall compel a sale, and shall have the money arising therefrom, and also the rents and profits till sale. II. 309

An annuity settled by a father upon a child to commence after the father's death, is an advancement *pro tanto*, and must be brought into hotchpot. II. 442

I devise 100*l. per annum* to my son *A.* and his wife for their respective lives, 60*l.* whereof to be paid to the wife for the support of herself and daughter, the remaining 40*l.* to my son: the son dies, his wife shall have the whole 100*l. per annum.* III. 121

One in satisfaction of a widow's dower mortgaged lands on condition to pay her 20*l. per annum*; this being an annual payment secured by land, was held liable to answer taxes as the land paid; but the court refused to make the annuitant refund in respect of the payments which she had received tax free, and for which the party paying had omitted to deduct. III. 128 (N)

See RENT.

Where one by will charged the residue of his personal estate with 40*l. per annum* to his wife, to be paid quarterly; the executor was ordered to bring before the master sufficient in bonds and securities to be set apart to answer this annuity. III. 336

ANSWER.

In what particular cases the answer of one defendant shall be read against another. I. 300

Vide also title EVIDENCE.

On a bill brought by the next of kin of the testator against an executor for an account of the surplus, the executor answered and waived the benefit of the surplus by mistake of the law in that point; and though he afterwards proved it to be the testator's intent that he should have the surplus, yet denied to amend his answer. *ibid.*

After a decree *nisi causa* against an infant on such infant's coming of age, and before the decree made absolute, he may put in a new answer. I. 504

A. while beyond sea sues *B.* at law, *B.* brings his bill against *A.*; the court will order, that service on *A.'s* attorney shall be good service, but not that such attorney shall put in an answer without oath. I. 523

Qu. If the defendant were in an enemy's

country, where no commission could go to take the answer. I. 523
Where the general traverse is omitted at the end of the answer, such answer is good, and not to be suppressed as improper. II. 87
Where a defendant insists on the benefit of the statute of limitations by way of answer, he shall at the hearing have the like benefit as if he had pleaded it. II. 145
On an answer's being reported not scandalous or impertinent, if the plaintiff except to the report, he must shew specially wherein it is scandalous or impertinent. II. 181
After the defendant has answered the bill, he cannot refer it for scandal. II. 311
Regularly the answer of a feme covert, if separate, ought to have an order to warrant it: but if the feme covert's separate answer be put in without an order, and the same be a fair honest answer, and deliberately put in with the consent of the husband, and the plaintiff accepts of it, and replies, the court will not, at the motion of the wife or of her executors, set it aside. II. 371
A feme covert cannot bind herself by her answer, much less her husband, as to her inheritance. II. 451
Upon a decree against an infant, unless cause, within six months after he comes to age, the infant may answer anew. II. 401
A copyholder in fee by will charges his lands with his debts; the lands being in *England*, and the heir an infant in *Scotland*, the creditors bring a bill to have their debts paid out of the copyhold premises; whereupon the heir appears, and there is an attachment for want of an answer; but the heir being an infant, the next step is to bring up the body; the heir being in *Scotland*, and out of the reach of the process of the court, the plaintiff cannot bring up the body; the infant shall answer by a certain time, or shew cause why a receiver should not be appointed. II. 409
An answer amended after hearing and decree on affidavit of the solicitor and his clerk, that the mistake was in ingrossing the answer from the draught, and the draught produced. II. 427
On time given to answer, the defendant may put in a plea, for that is as an answer, and on oath, but cannot put in a demurrer. II. 464
If time be given for a defendant to answer, though after sequestration, and though the answer be reported insufficient, yet the bill shall not be taken *pro confesso*. II. 556
A defendant cannot demur and answer to the same part of the bill, for the answer over-rules the demurrer. III. 80
Where the plaintiff sues both at law and in equity for the same thing, he will be put to make his election in which court he will proceed; but need not however make such election, till the defendant has answered. III. 90
One through great age being deprived of his memory, and become almost *non compos mentis*, was admitted to answer by his guardian, in regard the matter in question was but small: but had the value been considerable, the regular way had been to have taken out a commission of lunacy, and have got a committee assigned. III. 111(N)
An infant's answer cannot be given in evidence against him, because it is not the answer of the infant, but of the guardian, who is sworn, and not the infant. III. 237
But where a defendant put in an answer to a bill brought by an infant, who did not reply to it, in such case the answer was taken to be true, in regard the defendant, for want of a replication, was deprived of an opportunity of examining witnesses to prove his answer; and he ought not to suffer for such omission in the plaintiff. III. 237 (N) *Quære tamen.*
Baron and feme defendants to a bill; the feme must answer, though the answer cannot be read against the husband, but may (possibly) be read against her, if she survives. But in no case is the feme bound to answer a bill subjecting her to a forfeiture, though the husband has submitted to answer. III. 238

The defendant pleaded to the whole bill; and on arguing the plea, it was ordered to stand for an answer, without saying one way or other, whether the plaintiff might except; the plaintiff not allowed to except, for that by an answer was meant a sufficient answer; an insufficient answer being as none. III. 239

Why the answer of one defendant cannot be read against another. III. 311 (N)

Where a corporation aggregate are defendants, they are not liable to a prosecution for perjury, though their answer be never so false. III. 310

A defendant not bound to answer what tended to accuse him of maintenance, or of buying pretensed rights within 32 *H.* 8. *cap.* 9. III. 375

APPEAL.

On the plaintiff's petition to re-hear, the cause is open as to the whole and every part of it with respect to the defendant; while as to the plaintiff it is open only with regard to those things which are complained of in the petition. I. 300

No words in a grant from the crown can deprive a subject of his right to appeal; much less if the grant be silent in that particular. I. 329

An appeal lies from a decree in the *Isle of Man* to the King in council. *ibid.*

An appeal from decrees made in the plantations lies only to the King in council. II. 262

No appeal lies from an order or decree of the Lord Chancellor or Lord Keeper touching idiots or lunatics, but only to the King in council. III. 108. (N) *Where see the Resolution of the House of Lords on that Point.*

An agreement was signed by the parties, and by consent made an order of court, to submit to such decree as should be made, and neither party to bring an appeal; yet the cause allowed to be re-heard. III. 242

APPEARANCE.

An order for appearing *gratis* implies that the defendant shall pray no day over. II. 368

APPOINTMENT.

An appointment of an annuity to be paid out of an office, if voluntary, is countermandable. I. 101

A trust of lands is limited to *A.* his heirs and assigns, or to such as he or they shall appoint; *A.* devises these lands by a will attested but by two witnesses; the will void, and shall not operate as an appointment. II. 258

And see Deed, Power.

APPORTIONMENT.

The court will apportion interest on a mortgage. II. 176

By a marriage settlement maintenance for daughters is made payable half-yearly at *Lady-day* and *Michaelmas*, until the portions become payable, which is at eighteen or marriage; a daughter attained her age of eighteen the 16th of *August;* decreed to have her maintenance *pro ratâ*, from the last *Lady-day* till the time of her attaining eighteen. II. 501

And see Average, Rent.

APPRENTICE.

Putting out a child apprentice not to be reckoned as a part of his advancement. III. 317 (N)

And see Master and Servant.

ARBITRATORS.

See Award.

ARREARS OF RENT.

See Rents.

ARREST OF JUDGMENT.

See Judgment.

ARMY.

Buying for a child a commission in the army, to be reckoned as part of his advancement. III. 317 (N)

ARTICLES.

See Agreement.

ASSENT AND CONSENT.

Executor compellable in equity to give his assent to a legacy. I. 287

If a legacy be assented to by the executor, it from thenceforth becomes a legal property. II. 531

Where a term for years is devised to *A.*, for life, remainder to *B.*, and the executor assents to the devise to *A.* this is a good assent to the devise over. III. 12

Where the husband for a valuable consideration, covenants that his wife shall join with him in a fine, equity will enforce a performance of the agreement, on a presumption that the husband has first gained his wife's consent for that purpose. III. 189

See also the Note there subjoined.

Where money is on a marriage to be laid out in land with the consent of trustees, the *cestuy que trust* is to do the first act, *viz.* to propose his purchase and settlement, and the trustees are not previously to consent. III. 214

And see LEGACY.

ASSETS.

A. by will devises land to trustees and their heirs, in trust that the profits should be equally divided between his wife and daughter (the heir of the testator) during the wife's life, and after her death he devises the same to the use of his daughter in tail, with remainder over; the daughter dies without issue and intestate during the mother's life; resolved by all the judges of *C. B.* (to whom it was referred out of Chancery) that the mother and daughter were tenants in common, and that the mother should have a moiety of the profits during her life; the other moiety by the statute of frauds and perjuries to go to the administratrix of the daughter, and be assets in her hands, as before that statute it would have been liable to occupancy. I. 34

The husband borrows money, and he with his wife levies a fine of the wife's lands as a mortgage for it, after which the husband gives legacies and charities to the amount of his personal estate, and dies; the mortgage shall be paid out of his personal assets, though the charitable legacies will be thereby lost. I. 264

See also estates and interests of the wife under title BARON AND FEME.

Executors, in equity as well as at law, may prefer any creditor in equal degree, or after an action at law brought by one creditor, may confess judgment to another. I. 295

Where a feme sole seised mortgages, and marries *B.*, and the mortgage is assigned to *B.*, who in the assignment covenants to pay the money, and dies, his personal assets are not liable in equity to pay the mortgage money. I. 348

A mortgage comes to an executor who receives the money due thereon, and pays it away to his testator's creditors; and then it appears that the mortgage has been already satisfied; the executor must refund though he had before paid the money away in debts, which there were not otherwise assets to satisfy. I. 355

Where there were several executors, and some of them admitted assets; yet an account was decreed against the rest. II. 145

Husband after marriage purchases a term to himself and his wife, and the survivor, and the executors, administrators and assigns of such survivor; husband assigns the term in mortgage, proviso to be void on payment of the money by him or wife, or the executors of him or wife; provided also that the husband, his executors or administrators, shall until default of payment quietly enjoy; husband seven years after contracts debts, and dies; decreed that this settlement of the term being after marriage, in the power of the husband, and the equity of redemption being reserved to him as well as to the wife, and being also in the case of creditors, was assets to pay debts. II. 364

An estate for three lives granted to *A.*, his executors and administrators, is a personal estate, and will on *A.'s* death be liable to all his debts by simple contract, as a lease for years would be. II. 381

A. is a copyholder in tail, the lord grants the freehold of the copyhold to him in fee; the copyhold, though entailed, is extinct, and assets. III. 9

One binds himself and his heirs by a bond, and mortgages some lands of which he is seised in fee for more than the value; his heir has 200*l.* for joining in the sale of the premises; this 200*l.* is not assets. III. 10

A lease granted to one and his heirs for three lives is a real estate; and though by the statute of frauds it is made liable [or assets] to pay debts, it is only such debts as bind the heir. III. 166

Money articled on marriage to be laid out in land, and settled, is not assets even at law. III. 217

One possessed of a term for years mortgages it, and dies, leaving debts, some by bond, and others by simple contract; the equity of redemption is equitable assets, and shall be liable to all the debts equally. III. 341

But where a bond is given to *B.* in trust for *A.* who dies, the money due on the bond shall be paid in a course of administration: so if there be a term for years to *B.* in trust for *A.* III. 342

An executor assigns a term in trust to attend the inheritance; the term is by this means become not assets at law. III. 330

An advowson descending to an heir is real assets. III. 401

Assets marshalled, and in what order Debts are to be paid.

Where a husband receives money, which by his marriage articles was covenanted to be laid out in land and settled, and afterwards misapplies it, his assets are liable to make good this loss, not as a breach of trust, or as money received and misapplied, but as a debt by specialty. I. 131

One seised in fee owes debts by bond, and devises lands to his heir in tail, and gives several legacies, after which he dies, leaving the heir his executor; the heir with the personal estate pays off the bond debts, by which means there are not assets to pay the legacies; the legatees bring their bill, praying to stand in the place of the bond creditors, and to be paid out of the land devised to the eldest son. The court held the legatees to be without remedy, the land being (specifically) devised in tail to the heir; otherwise had the land descended to such heir in fee. I. 201, 678, 730

So though the court will marshal the assets in favour of a simple contract creditor and (generally speaking) in favour of a legatee, yet where such legatee is a pecuniary one, he will not be relieved, by being permitted to come in the place of the bond creditors upon the land in the hands of a devisee thereof. I. 204, 678

See also SPECIFIC LEGACY.

A recognizance not enrolled, or not regularly taken, shall be looked upon as a bond, and paid as a debt by specialty. I. 336, 340

One gives legacies by his will, and other legacies by his codicil, charging his lands only with the legacies in the will; on the personal estate's being insufficient to pay all the legacies, the land shall be charged with the legacies in the will, and the legacies in the codicil be paid out of the personal estate. I. 422

Where one devises his lands for payment of debts, bonds and simple contract debts shall be paid equally; but if he only charges his lands with the payment of his debts, letting them descend subject thereto, the bonds shall be preferred. I. 430

But if the heir sells the land before action brought, then both to be paid equally. I. 431

If a creditor by bond, or other creditor who may come upon the land, exhaust the personal estate, a legatee shall stand in his place, and be paid out of the real estate. II. 81

One by will gives several legacies, some charged on the real estate, others not; if the personal estate proves not sufficient to pay *all*, the legacies charged on the real estate shall be paid thereout; or if they have been paid out of the personal estate, the other legacies, as to so much, shall stand in their place upon the land. II. 620

One allowed the best purchaser under a decree, is ordered to pay the purchase money; this not a debt due by decree, but only by order of the court. II. 621

Where there is a decree for a debt, and the defendant dies, such decree does not bind the real assets descended to the heir, as a judgment does. *ibid.*

One devises all his real estate in trust to pay all his debts; the bond creditors recover part of their debts out of the personal estate; the simple contract debts shall be equally paid out of the real estate with the bond debts, and the bond creditors shall have nothing thereout, until the simple contract creditors shall have received as much from the same, as shall make them equal in payment with the bond creditors. III. 323

On a devise of lands to pay debts, a legatee, whether specific or pecuniary, shall be paid out of the lands, if the simple contract creditors have exhausted the personal estate. *ibid.*

If one owes debts by bond, and devises his lands to *J. S.* in fee, and leaves a specific legacy, and dies, and the bond creditor comes upon the specific legacy for payment of his debts; the specific legatee shall not stand in the place of the bond creditor to charge the land. III. 324

A. died seised of some lands in fee, and considerably indebted by judgment and simple contract; and after the death of *A.*, and before the essoign day of the next following term, many of the judgment creditors delivered *fieri facias's* to the sheriff, and took the goods in execution; here, forasmuch as the judgment creditors by relation had evicted these goods from *A.* in his lifetime, (such their execution relating to the teste of the writ) the simple contract creditors were held to be without remedy, and not allowed to stand in the place of the judgment creditors, and be paid out of the land in proportion as they had exhausted the personal estate. III. 399, 400 (N)

See also Heir, Executor, Personal Estate, Securities, and Incumbrances.

Assets by Descent and in the Hands of the Heir.

One seised of lands in fee binds himself and his heirs in a bond, and dies, having devised his lands to *J. S.* in fee; in a bill brought by the obligee to subject the land devised, the devisor's heir must be made a party. I. 99

One seised in fee mortgages to *A.*, and afterwards binds himself and his heirs to *A.* and dies; if the heir comes to redeem this mortgage, he must pay the bond debt as well as the mortgage. I. 775

An heir in action brought on his ancestor's bond must be sued as for his own debt in the *debet et detinet.* I. 776

See also title Mortgage, Redemption, Foreclosure.

ASSIGNMENT.

Debts due to a feme sole, who afterwards marries, and her husband becomes a bankrupt, are, though unrecovered, assignable by the commissioners, by the 4 & 5 *Ann. cap.* 17. I. 249

In like manner debts due to the wife *dum sola*, though unrecovered, are, on the husband's bankruptcy, assignable by the commissioners. *ibid.*

See also tit. Baron and Feme.

A son on his marriage is to have 3000*l.* portion with his wife, and privately and without notice to his father or mother, who treated for the marriage, gives a bond to the wife's father to pay back 1000*l.* of the portion seven years afterwards; and the obligee assigns the bond to a creditor; the bond being void in equity, such assignment shall not make it good. I. 496

See also *Marriage brocage bonds.*

One having a bond receives the money due upon it, and afterwards assigns it for a valuable consideration as unsa-

tisfied to another, a purchaser can have no avail of this bond. I. 497
A devisee in remainder of a term articles for a valuable consideration to sell it, this is a good assignment in equity, and the devisee in remainder is afterwards but a trustee for the purchaser. I. 574
See also POSSIBILITY, WILL.
A chose in action, though not assignable at law, yet is so in equity, where the husband may assign it alone, as he may any other part of the wife's personal estate; so may a contingent interest which the husband has in right of his wife, or a possibility of a term, which though not good strictly by way of assignment, yet will operate as an agreement, where for a valuable consideration. II. 608
A contingent interest, and which may be released by the bankrupt, is assignable by the commissioners. III. 132
See also BANKRUPT.
A man possessed of a *chose en action* in his own right, may assign it, though without any consideration. III. 199
But baron possessed of a *chose en action* in right of his wife, cannot assign it unless for a valuable consideration, and yet he may release it. *ibid.*
If the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration; so if a judgment be given in trust for a feme sole, who marries, and by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries; the husband may assign it without any consideration; for it is in nature of an extent III. 200
At common law if a man had granted a rent to *A.* his executors and assigns, during the life of *B.*, and afterwards the grantee had died leaving an executor but no assignee; the executor should not have had the rent, in regard it being a freehold, the same could not descend to an executor: but this is helped by the statute of frauds. III. 264(N)
Where the thing assigned is only a *chose en action*, though the assignment be without notice, yet as no legal estate passes, *qui prior est in tempore, potior est in jure.* III. 308
If there are two executors, who are also residuary legatees, and one of them for a valuable consideration assigns part of his *residuum* to *A.*, and afterwards for a valuable consideration assigns his whole *residuum* to the other executor, if both are but *choses en action*, the first must take place. *ibid.*

ATTACHMENT.

See PROCESS.

ATTAINDER.

An attainder of major-general *Thomas Gordon*, laird of *Auchintoule*, will not extend to attaint the party, if his name be *Alexander* and not *Thomas*, though the rest of the description agree. I. 612
Guardians are recommended by will to act with the advice of *J. S.*, and *J. S.* is afterwards attainted, this superintendency devolves upon the great seal. I. 706
And see FELONY AND OUTLAWRY.

ATTORNEY AND SOLICITOR.

A. being beyond sea, sues *B.* at law, *B.* brings a bill in equity against *A.* Court will order that service on the defendant's attorney at law shall be good service, but not that such attorney shall put in an answer for him without oath. I. 523
So if there had been a general letter of attorney to appear in and defend suits, the court would have ordered such attorney to appear for the principal, and that service on him should be good service. *ibid.*
Upon the attorney's or solicitor's appearing to be guilty of a gross neglect, the court will order him to pay the costs. I. 593

A country client employs an attorney or solicitor in the country in a cause in chancery; the solicitor employs a clerk in chancery; the client in the country pays his solicitor, but the clerk in chancery is unpaid; the client not bound to pay the clerk in chancery: but if the latter has any papers in his hands, he may retain them. II. 460

Notice of motion given by one not allowed to act as solicitor, not good. III. 104

An attorney for and on behalf of his client the defendant promises to pay 500*l.* to the plaintiff; this being done by the authority of the client, the attorney is not liable, but only the client; *secus*, if the attorney had no authority from his client to make this engagement. III. 277

ATTORNMENT.

A corporation aggregate could not at common law make an attornment without deed, neither could such attornment be on a condition subsequent. III. 426

Attornment taken away by 4 & 5 *Ann. cap.* 16. *sect.* 9. *ibid.*

AVERAGE AND CONTRIBUTION.

One seised in fee of some lands, and possessed of leases for years of other lands, devises the fee to *A.*, and the leases to *B.*, and dies indebted by bond; on a deficiency of assets both the devisees shall contribute in proportion to the value of the respective devised premises towards payment of the bond debts: but if the devise had been to *A.* of all the rest of the testator's estate, then *A.* should have paid the debts. I. 403

One seised in fee of the manors of *A.* and *B.*, mortgages *A.* for 4000*l.* and by will charges all his real estate with the payment of his debts, and devises *A.* to *C.*, and *B.* to *D.*, and dies; the devisee of *A.* shall compel the devisee of *B.* to contribute to pay the mortgage on *A.*; but if the will proves void, then no contribution. I. 505

One by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by his will; the copyhold, though not surrendered to the use of the will, shall yet be applied to the payment of the debts *pari passu* with the freehold. III. 96

If I charge all my lands with payment of my debts, and devise part to *A.* and other part to *B.*, &c. the creditors cannot be paid out of the lands till the master has certified what the proportion is, which each devisee is to contribute: but if the master certifies that the debts will exhaust the whole real estate, then the creditors may proceed against any one devisee for the whole. III. 98

One dies indebted by bond, and seised in fee of divers lands, part of which he devises to *J. S.*, and the other part he devises to his heir at law; though this latter devise is void, (as to the purpose of making the heir take otherwise than by descent,) yet it shews the testator's intent that the heir should have this land; and therefore (as it seems) the land devised to *J. S.*, and the other lands devised to the heir at law, shall contribute in proportion to pay the bond debts. III. 367 (N)

Lease of a coal-mine, reserving rent, *A.* the lessee declares himself a trustee for five persons, to each a fifth. The five partners enter upon, work and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent; decreed that the *cestuy que trusts* should contribute each one-fifth towards satisfying the plaintiff the arrears of rent that had incurred during the time they had concerned themselves in taking the profits. III. 404 (N)

AUTHORITY.

Where a bare authority is given to two, it will not survive without express words for that purpose. II. 103, 628

A corporation aggregate cannot without deed authorize or empower a third person to seize goods for their use as

forfeited, nor to enter for a condition broken. III. 424, 425

AWARD.

A mother tenant for life of a house, remainder to her six daughters in fee; the mother and *J. S.* submit to an award touching the title to this house; whereupon the arbitrators award, that the mother should procure the daughters to join in a conveyance thereof: the daughters are married, and one dies leaving an infant heir; *J. S.* brings a bill against the mother and daughters and their husbands, and the daughters being examined in a former cause, say they are willing to convey; they are not bound touching any title to the freehold and inheritance. II. 450

A bill lies to compel a specific performance of an award to convey an estate, where the party submitting has received the money, in consideration of which he is to convey the estate sued for. III. 187

Difference between awards to pay money, and to do any thing collateral; and why a bill in equity may be proper only to compel a performance of the latter. III. 190

After an award made, it is too late to confirm the submission so as to make it good within the act of 9 & 10 *W.* 3. *cap.* 15. III. 361

A party submitting to an award, desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him: though this was within two or three days before the time for making the award was out, yet the request not being complied with, the award was held ill. *ibid.*

B.

BAIL.

Suing the bail pending a writ of error in parliament is a contempt and breach of privilege. I. 685

A *Ne exeat regnum* ought not to be granted where the demand is entirely at law; for there the plaintiff has bail, and he ought not to have double bail, both at law and in equity. III. 314

See also the note. *ibid.*

And see SURETY.

BANK OF ENGLAND AND BANK NOTES.

One with lemon juice takes out a receipt written on the inside of a bank note, but called an indorsement; this held to be rasing an indorsement within the 8 & 9 *W.* 3. *cap.* 19. *sect.* 36., and to be felony without clergy. III. 419

BANKRUPT.

A creditor by statute of *J. S.*, if *J. S.* becomes bankrupt, and the statute be not sued and executed before the bankruptcy, should come in only *pro ratâ*, though there were lands in fee bound by the statute. I. 92

A. lends money to *B.* and *C.* on bond, *B.* becomes bankrupt, and his estate is assigned by the commissioners. *A.* sues *C.* and takes him in execution on a *ca' sa'*, and afterwards consents to his escape; yet *A.* shall come in as a creditor of *B.* the bankrupt for a moiety of his remaining debt. I. 237

The wife *dum sola* enters into a bond, and then marries, after which the husband becomes a bankrupt; this debt by virtue of the statute of 4 & 5 *Annæ*, *cap.* 17. is discharged by such bankruptcy. I. 249

In like manner debts due to the wife *dum sola*, though unrecovered, are, on the husband's bankruptcy, assignable by the commissioners. *ibid.*

See BARON AND FEME.

The plea on the statute of the 4 & 5 *Annæ*, relating to bankrupts, and their discharge, must conclude to the country. I. 258

A single creditor to whom 100*l.* was due from *A.* by two notes, and 53*l.* part thereof not yet payable, (before the 5 *Geo.* 2.) sued out a commission

of bankruptcy, such commission set aside as irregular. I. 260

So also of a bond, where the obligee took out a commission before the day of payment. I. 610

A. surrenders a copyhold by way of sale or mortgage, but the surrender is not presented as it ought to have been, after which *A.* becomes a bankrupt; the copyhold is bound by the surrender, and not liable to the bankruptcy. I. 280

A bankrupt though in possession, yet if empowered to dispose of goods in trust for another, they are not liable to the bankruptcy either in law or equity. I. 314

Husband before he has received the wife's fortune becomes a bankrupt, the assignee shall not receive it without making some provision for the wife. I. 382

A possibility of right belonging to a bankrupt is not assignable by the commissioners. I. 385

Commissioners, after they have made an assignment of the bankrupt's effects, and given him his certificate and discharge, cannot make a subsequent assignment. I. 386

A feme sole mortgagee in fee marries, and the husband becomes a bankrupt, and dies, the assignees of the bankrupt, and not the wife, are entitled to the mortgage; *secus*, if by articles before marriage it was agreed that this should continue to the wife. I. 458, 461

See title Baron and Feme.

Though a creditor comes into a commission of bankruptcy, proves his debt, and is prevailed on to be an assignee (being informed that otherwise he should lose his debt) yet if the bankrupt has no estate, the creditor may take the bankrupt in execution if he will waive any benefit of the statute. I. 560

The reason of a creditor's coming in under a commission of bankruptcy, and proving his debt, may be to oppose the bankrupt's being discharged. I. 562

No election, in case of a creditor's coming in under the commission, to be paid out of the bankrupt's effects, if no effects. I. 562

Argument of fraud, if the commission be sued out by the bankrupt's father in order to discharge the bankrupt. I. 563

A bankrupt's wife cannot be examined against her husband to prove his bankruptcy, though by the statute of 21 *Jac.* 1. she be made examinable touching the discovery of her husband's effects. I. 611

By 5 *Geo.* 1. *cap.* 24. a bankrupt may be examined touching his own bankruptcy. *ibid.*

If one of the reasons for the commitment of a bankrupt be illegal, and the party to continue in custody till something which is illegally required of him be done, the whole commitment is naught. *ibid.*

Creditors of a bankrupt who come into the commission shall not imprison the bankrupt for not paying the debt. I. 612

A creditor petitions against the allowance of the bankrupt's certificate, upon which the bankrupt gives him a bond for payment of his whole debt in consideration of such creditor's withdrawing his petition; equity will not relieve against such bond. I. 620

A trader seised of lands in fee gives judgment to *B.*, and then sells the land to *C.*, and afterwards becomes a bankrupt; though the judgment creditor cannot come in for more than his proportion with the rest of the bankrupt's creditors, whether he may not extend the lands in *C.* the purchaser's hands, *C.* having purchased before the bankruptcy, and this not prejudicing the creditors. So if *A.* the trader gives judgment to *B.*, and articles for a valuable consideration to sell to *C.*, and then becomes a bankrupt; it seems the judgment shall bind the lands in the hands of *C.* who articled to buy them: but whatever money the purchaser was to pay the bankrupt, the same shall be liable to the bankruptcy. I. 737

Bankrupt, before his bankruptcy, gave a note to *A.* for 100*l.* payable to *A.*, or order. *B.* buys in the note for 50*l.*,

and yet *B.* is a legal creditor for 100*l.*, and may sue out a commission against the bankrupt; *secus*, of an assignee of a bond, he not being the legal creditor, or if the indorsement were after the bankruptcy. I. 782

Where a bankrupt after certificate allowed, is sued for a debt accrued before his bankruptcy, the court, on the circumstances of the case, will relieve, though it will not relieve on a matter purely of mispleading. II. 70

A. draws a bill payable to *B.* on *C.* in *Holland*, for 100*l.*; *C.* accepts it; afterwards *A.* and *C.* become bankrupts, and *B.* receives 40*l.* of the bill out of *C.*'s effects, after which he would come in as a creditor for the whole 100*l.* out of *A.*'s effects; *B.* permitted to come in as a creditor for 60*l.*, and the master to see whether the other 40*l.* was paid out of *A.*'s effects in *C.*'s hands, or out of *C.*'s own effects; if the latter, then *C.* is a creditor for this 40*l.* also, but if out of *A.*'s effects, then 40*l.* of the 100*l.* is paid off. II. 89

Buying and selling stock will not make one a bankrupt. II. 308

One devises lands in fee to his daughter, being a feme sole, for her separate use, without appointing any trustees; the husband is a tradesman and becomes a bankrupt; yet the devised premises not subject to the bankruptcy. II. 316

A creditor coming in under a commission of bankruptcy, though only to prove his debt, and oppose the bankrupt's obtaining his certificate, shall not sue the bankrupt at law, unless he will waive all benefit of the commission, not only as to dividends, but as to his voting against the bankrupt's gaining his certificate. II. 394

Regularly speaking, at common law none could come in on a commission of bankruptcy but such as were creditors at the time of the bankruptcy, because the bankrupt could not afterwards charge his estate: but now since the 7 *Geo.* 1. *cap.* 31. if *A.* gives a note under hand payable at a future day, before which day he becomes a bankrupt; in this case the creditor by note shall come in: but if a bond or note be given to pay money on a contingency, before the happening of which contingency the obligor or giver of the note becomes a bankrupt, this is not within the statute. II. 396

A. gives a promissory note for 200*l.* payable to *B.* or order, *B.* indorses it to *C.*, who indorses it over to *D.* *A.*, *B.*, and *C.*, become bankrupts, and *D.* receives 5*s.* in the pound on a dividend made by the assignees against *A.*; he shall come in as a creditor for 150*l.* only out of *B.*'s effects; and if he has paid contribution money for more than 150*l.*, it shall be returned. II. 407

A goldsmith after shutting up his shop, being greatly indebted, assigned his stock in the wine trade in which he was concerned to *J. S.*, being a particular creditor, and to secure his debt, without the knowledge of *J. S.*, and becomes a bankrupt the very next day; *J. S.* brings a bill to have the benefit of this assignment and decreed for him. II. 427

No such thing as an equitable bankrupt, but it must be a legal one. II. 429

There may be reason for a bankrupt to prefer one creditor to another. *ibid.*

The time when the assignment was made is not material, so as it be before the bankruptcy; but the justness of the debt is material. II. 430

No objection, that the assignment was made by the trader without notice to the party, for this shews it was without the creditor's importunity. *ibid.*

But if the assignment be of the bankrupt's whole estate to prefer any creditor, this seems to be void. II. 431

A trader on marriage gives a bond to a trustee to secure 1000*l.* to the wife, if she survive him; the trader becomes a bankrupt; this debt shall not be allowed, nor any reservation made for it, nor shall it stop the distribution, in regard it may never be a debt; within the same reason an obligee in a bottomry bond shall not, before the return of the ship, come in under a commission of bankruptcy: but in either of these cases, if the contin-

gency happens before the bankrupt's estate be fully distributed, such creditor shall come in for his proportion. II. 497

But in the case above mentioned of the bond, the obligee, if he declares upon his bond only, will be barred; *secus*, if he sets forth in the declaration as well the condition as the bond. II. 499

It is a resolution of convenience, that in case of joint traders becoming bankrupts, the joint creditors shall be paid out of the partnership effects, and the separate creditors out of the separate effects; and if any surplus of the partnership effects, after all the partnership debts paid, the separate creditors to come in, and so *vice versâ* the partnership creditors to come in on a surplus of the separate estate. II. 500

Two joint traders becoming bankrupts, first there was a joint commission, and the commissioners assign; afterwards separate commissions and assignments under them; the court held that the assignment under the first commission conveyed all the bankrupt's estate, both joint and several, and consequently that the conveyance under the separate commission was void. *ibid.*

One sued out a commission of bankruptcy, and for six months kept it without doing any thing upon it; the court for this reason only superseded the commission, though it was executed, and the trader found a bankrupt before any application to supersede it. II. 545

Assignee under a commission of bankruptcy dies very much indebted by bond, &c. and the creditors of the bankrupt petitioned that the administrator of the assignee might account before the commissioners, he having some of the bankrupt's effects in *specie* in his hands: but the administrator denying this upon oath, and swearing that there were debts by specialty beyond the assets, the court thought this proper for a bill, and not for a summary way of accounting before commissioners. II. 546

On a joint commission against two partners bankrupts, the separate creditors, though they have taken out separate commissions, shall yet be at liberty to come in to oppose the allowing of the certificate. III. 23

Where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate, this will bar as well their separate, as their joint debts, and so *vice versâ*. III. 24

On a joint commission, the joint creditors are first to come in on the partnership effects; and if there remains a surplus, then the separate creditors are to be admitted. III. 25

A contingent interest, or possibility in a bankrupt, is assignable by the commissioners; as where a devise was to such of the children of *A.* as shall be living at his death; *A.* had issue *B.*, who becoming a bankrupt, got his certificate allowed; this contingent interest held liable to the bankruptcy [and assignable] for as much as the son in the father's lifetime might have released it. III. 132

Though the assignee of the effects of a bankrupt claims under an act of parliament, yet, as the statute of limitations might be pleaded against the bankrupt, by the same reason it is pleadable against such assignee. III. 144

One not in debt, nor then a trader, makes a voluntary settlement on a child, and afterwards becomes a trader and a bankrupt: this settlement not liable to the bankruptcy. III. 298

If *A.* and *B.* joint traders, become bankrupts, and there are joint and separate commissions taken out against them, and *A.* and *B.* before the bankruptcy, become jointly and severally bound to *J. S.*, *J. S.* may elect under which commission he will come, but shall not come under both. III. 405

But if two joint traders owe a partnership debt, and one of the partners gives a bond as a collateral security for payment of this debt; here the joint debt may be sued for by the partnership creditors, who may like-

wise sue the bond given by one of the traders. III. 408

BANISHMENT.

Banishment cannot be but by act of parliament. III. 38

BARGAINS, CATCHING.

See HEIR.

BARON AND FEME.

A personal estate was devised to a feme covert for her separate use without naming trustees, this, by the opinion of Lord *Cowper*, not good to exclude the husband from intermeddling. *Quære tamen.* I. 125

What circumstances will undoubtedly make such will good. I. 126

Debts *of* the wife contracted *dum sola* are discharged by the bankruptcy of the husband, as on the other hand debts due *to* the wife *dum sola* are assignable on the bankruptcy by the commissioners. I. 249

Debt due to the wife *dum sola*, forfeited and assignable to the king by the husband. I. 253

The wife is for ever discharged by the discharge of the bankrupt husband. I. 257

Husband borrows money, and he and the wife levy a fine of the wife's land as a mortgage for it, after which the husband by will gives legacies and charities to the amount of his personal estate and dies; the mortgage money shall be paid out of his personal assets, though to the defeating of the charity legacies. I. 264

But all the husband's debts, even those by simple contract, shall be preferred to the mortgage. *ibid.*

Where a feme sole seised mortgages, and marries *B.* and the mortgage is assigned, and *B.* in the deed of assignment covenants to pay the mortgage money, his personal estate is not liable in equity to pay the same, unless he received it. I. 348

Feme covert possessed of *choses en action* dies, her husband administers, and makes a voluntary assignment, this is an alteration of the property. I. 378

So if the husband had survived, and then had died without altering the property, or so much as administering to his wife. *ibid.*

Husband before he has received the wife's fortune becomes a bankrupt, the assignee shall not receive the same without making some provision for the wife. I. 382

A feme sole mortgagee in fee marries, and the husband becomes a bankrupt and dies, the assignees of the bankrupt, and not the wife, are entitled to the mortgage; *secus*, if by articles before marriage it was agreed that this should continue to the wife. I. 458, 461

Feme sole owes debts by bond, and having married dies leaving no *legal* assets, but at the marriage had a term for years, jewels, &c. in consideration of which the husband makes no settlement; the husband not liable in equity any more than at law. I. 466

Husband during the coverture liable for all his wife's debts, though he had nothing with her; and on the other hand, though he had a portion in goods, jewels, or other personal estate with his wife, yet if he happens not to be sued for her debts during the coverture, he will not be liable afterwards. I. 469

Baron gives feme the foul distemper, *A.* lends the wife 30*l.* to pay the doctor for her cure, baron devises lands for the payment of his debts; this 30*l.* is a debt of the husband's, and *A.* is a creditor in the doctor's place. I. 482

Though a wife cannot at law borrow money even for necessaries, so as to bind her husband; yet if such money is applied to the wife's use for necessaries, the lender of the money shall in equity stand in the place of him who found the necessaries. I. 483

The wife, after the death of her husband, will not be admitted in equity

to recover the arrears of her separate estate. II. 82

Husband seised in right of his wife of a share in the *New River* water; the wife cannot be barred without a fine; and where they both without a fine, mortgage such share, the wife's paying interest after the husband's death will not affirm the mortgage. II. 127

Feme covert having a separate estate borrows money on bond; the separate estate liable; and though six years pass, the demand not barred by the statute of Limitations. II. 144

Feme gives a bond to her intended husband, that in case of their marriage she will convey her lands to him in fee; they intermarry, the wife dies without issue, and then the husband dies; the bond, though void in law, is yet good evidence of the agreement in equity, and the heir of the husband shall compel a specific performance against the heir of the wife. II. 243

One devises lands in fee to his daughter, being a feme covert, for her separate use, without appointing any trustees; the husband is a tradesman, and becomes a bankrupt; yet the devised premises not subject to the bankruptcy. II. 316

Where an annual sum is secured for the wife's pin-money for her apparel and expenses; if they cohabit together, and the husband maintain her, the arrears of pin-money are not recoverable. II. 341

Husband after marriage purchases a term to himself and his wife, and the survivor, the executors, administrators and assigns of such survivor; husband assigns the term in mortgage, proviso to be void on payment of the money by him or wife, or the executors of him or wife; provided also that the husband, his executors or administrators, shall until default of payment quietly enjoy; husband seven years after contracts debts, and dies; decreed that this settlement of the term being after marriage, in the power of the husband, and the equity of redemption being reserved to him as well as to the wife, and being also in the case of creditors, was assets to pay debts. II. 364

Regularly the answer of a feme covert, if separate, ought to have an order to warrant it: but if the feme covert's separate answer be put in without an order, and the same be a fair honest answer, and deliberately put in with the consent of the husband, and the plaintiff accepts of it, and replies, the court will not, at the motion of the wife, or of her executors, set it aside. II. 371

A feme covert cannot bind herself by her answer, much less her husband, as to her inheritance. II. 451

Baron and feme bring a bill to redeem a mortgage; defendants plead to the bill, and the plea being over-ruled, 5*l.* costs are given to the plaintiffs; baron dies, the feme by survivorship shall have the costs. II. 496

Where a bond is given to the baron and feme during the coverture, on the death of the baron it will survive to the wife. II. 497

Husband marries an infant entitled to a great personal estate, pending a bill for an account of such estate, and applies to the court for the wife's portion, whereupon he is directed to make proposals before the master; the court accept proposals from the husband to settle only part of her fortune on the wife and her issue. II. 639

Though where the husband has a legal title to the wife's personal estate, equity will not interpose in prejudice of such right; yet where he cannot get at it without the assistance of this court, it will put terms upon him. II. 641

If money be devised to an infant daughter, who marries, the court may refuse helping the husband to the money, unless he makes a suitable settlement. III. 12, 202

Where the husband was attainted of felony, and pardoned on condition of transportation; and the wife afterwards became entitled to some personal estate as orphan to a freeman of *London*; this personal estate decreed to belong to the wife as to a feme sole. III. 37, 38

Instances where a feme covert having a separate estate, has been sued in respect thereof as a feme sole. III. 38 (N)

The custody of a lunatic may be granted to a feme covert, though she be not *sui juris*, but under the power of her husband. III. 111 (N)

Where the husband, for a valuable consideration, covenants that his wife shall join with him in a fine; equity will enforce a performance of such covenant. III. 189

But if it can be made appear to have been impossible for the husband to procure the concurrence of his wife (as suppose there are differences between them) and the husband offers to return all the money with interest and costs. *Qu.* If under these circumstances the husband would not be excused? *ibid.* (N)

Baron possessed of a *chose en action* in right of his wife, may assign it for a valuable consideration; *secus*, if there be no consideration. III. 199

In all cases where a husband makes a settlement on his wife in consideration of her fortune; the wife's portion, though consisting of *choses en action*, and though there be no particular agreement for that purpose, is looked on as purchased by him, and will go to his executors. *ibid.* (N)

If the wife has a judgment, and it is extended on an *elegit*, the husband may assign it without a consideration; so if a judgment be given in trust for a feme sole who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over this extended interest; and by the same reason, if the feme has a decree to hold and enjoy lands, until a debt due to her is paid, and she is in possession of the land under this decree, and marries; the husband may assign it without any consideration, for it is in nature of an extent. III. 200

Baron and feme are defendants to a bill; the feme must answer, though the answer cannot be read against the husband, but may (possibly) be read against her, if she survives. III. 238

But in this case the feme is not bound to answer the bill, if tending to subject her to a forfeiture, though the husband has submitted to answer. III. 238

Where the wife sues the husband for a specific performance of her marriage articles, and that he may settle such and such lands on her for her jointure; it is no bar to her demand, that she has eloped with an adulterer; much less if this be not by the husband put in issue in the cause. III. 269

A precedent cited, where a reconciliation by the husband, after the wife's going away with the adulterer, is specially pleaded, and the plea allowed. III. 273 (N)

In the case of a divorce *a mensa et thoro*, baron and feme live separately, and the wife has a child; this is a bastard; for the court will intend obedience has been paid to the sentence during this time. But if in the case of a voluntary separation a child is born, this is legitimate. *Secus*, where the jury find the husband has had no access to his wife. III. 275

Articles to settle lands in jointure are in nature of an actual jointure, which is not forfeited by elopement, like dower. III. 276

Why a husband does not forfeit his tenancy by the curtesy on leaving his wife and living in adultery, as a wife forfeits her dower by elopement. *ibid.*

A husband voluntarily, and after marriage, allows the wife, for her separate use, to make profits of all butter, eggs, pigs, poultry, and fruit, beyond what is used in the family; out of which the wife saves 100*l.* which the husband borrows, and dies; the court allowed of this agreement to encourage the wife's frugality, and the wife admitted to come in as a creditor for this 100*l.*, especially there being no defect of assets to pay debts. III. 337

So where the husband agreed that the wife should take two guineas of every tenant that renewed a lease with the husband, beyond the fine which the

husband received; this was allowed to be the wife's separate money. III. 339

A. having a wife who lived separate from him, afterwards courted and married another woman who knew nothing of the former wife's being alive: but it being discovered to the second wife that the former was living, *A.* in order to prevail on the second wife to stay with him, some years afterwards gave a bond in trust for the second wife, to leave her 1000*l.* at his death, and died, not leaving assets to pay his simple contract debts; decreed, that this bond, as it was given on an illicit consideration, and consequently worse than a voluntary bond, should be postponed to all the simple contract debts; though had it been given immediately on the discovery that the first wife was alive, and they had parted thereupon, it had been good, as given on a just consideration. *ibid.*

The equity of redemption comes to a feme covert, against whom and her husband a bill is brought to foreclose; the feme covert shall be foreclosed absolutely, and shall have no time to shew cause after the death of her husband. III. 352

Husband on marriage settles 100*l.* *per annum* pin-money in trust for the wife, for her separate use, which becomes in arrear, and then the husband gives the wife a legacy of 500*l.*, after which there is a further arrear of pin-money, and then the husband dies; this legacy being greater than the debt, decreed even in the case of a wife, to be a satisfaction of the arrears of pin-money due before the making of the will. III. 353

Where pin-money is secured to the wife and the husband finds her in clothes and necessaries; this is a bar as to any arrears of pin-money incurred during such time. III. 355

A *donatio causâ mortis* may be from a man to his wife. III. 357

A woman indebted *dum sola*, marries, and brings a portion to her husband, and dies; equity will not help the creditor against the husband to the value of what he received with his wife. III. 409

So on the other hand, where a woman indebted *dum sola*, marries, and brings no portion to her husband, against whom judgment is recovered for such debt, and then the wife dies; equity will not relieve the husband against the judgment. III. 412

See also AGREEMENT *on Marriage.*

BASTARD.

If lands are devised to a bastard and his heirs, though he can have no heirs but such as are his issue, yet it is a fee-simple. I. 78

One devises 3000*l.* to all the natural children of his son by *John Stiles*, the bastards born after the making of the will shall not take, nor even the child *in ventre sa mere*, bastards being incapable of taking till they have gained a name by reputation. I. 529

And though in the principal case the money was to be paid by the executors as the testator by deed should appoint, and the testator afterwards made a deed of appointment, yet such deed referring to the will was held as part thereof. I. 530

One having a bastard, leaves a personal estate to her executor in trust for the bastard, who dies intestate without wife or issue. The executor brings a bill against one who has part of this personal estate in his hands. The defendant demurs, because the attorney-general and the administrator of the bastard are not parties; demurrer disallowed, for that the executor has the legal title, and consequently may sue for the estate. III. 33

A bastard dies intestate without wife or issue; the king is entitled, and the ordinary of course grants administration to the patentee or grantee of the crown. *ibid.*

A church lease for three lives is granted to a bastard and his heirs, who dies without issue and intestate. *Qu.* Shall this lease go to the administrator of the bastard or to the crown; or does it, not being within the statute of frauds and perjuries, remain liable to

occupancy at common law, or is the lessor entitled? III. 33, 34 (N)
In the case of a divorce *a mensâ et thoro*, baron and feme live separately, and the wife has a child; this is a bastard; for the court will intend obedience has been paid to the sentence during this time: but if after a voluntary separation a child is born, it will be legitimate, unless the jury find the husband had, during that time, no access to his wife. III. 275

BENEFIT OF CLERGY.

See CLERGY.

BILL.

A bill brought by a bond-creditor against a devisee on the statute of fraudulent devises must make the heir a party. I. 100
A bill lies to perpetuate testimony before trial, on affidavit annexed. I. 117
A. brings his bill against *B.* and *C.* who put in insufficient answers, and prefer their cross bill against *A.*, *B.* becomes a bankrupt, his assignees bring a bill in nature of a bill of revivor against *A.*; they shall not go on till *C.* has answered *A.*'s bill. I. 266
A bill does not lie for an owner of a quit-rent, in order to settle what proportion his quit-rent shall pay to the land-tax. I. 329
Bill in equity lies to recover back money paid on a bubble. II. 154
The original bill is to be first answered; but if the plaintiff, after the cross bill filed, amend his bill, he loses his priority. II. 435

In what Cases a Bill is or is not proper.

A bill will not lie for a tenant to be relieved out of the arrears of rent, for the taxes which the tenant had paid on account of rent reserved to a charity, that appeared to be exempted from taxes. III. 128 (N)
So where one had an annual payment secured on land, which annuity was held liable to answer taxes in proportion as the land paid; it was held a bill would not lie to make the annuitant refund in respect of the payments she had received tax free, and for which the party paying had omitted to deduct. III. 128 (N)
A bill is brought by a lord of a manor to recover a fine for a copyhold, on a suggestion that the defendant was admitted by attorney, but sometimes pretends the attorney had no authority to make such admittance; the defendant answers as to part, but demurs as to relief; demurrer allowed. III. 148
Lord brings a bill against a tenant to recover a quit-rent, alleging that the land out of which the quit-rent issues, by reason of the unity of possession with other lands, is not known; the defendant answers as to discovery, and demurs as to relief; the demurrer allowed. III. 149
Quære tamen.
A single copyholder is not relievable in equity for an excessive fine, (that being determinable by a jury) but, to avoid multiplicity of suits, several copyholders may join to be relieved against a general fine that is excessive. III. 157
A bill lies to compel a specific performance of an award to convey an estate, where the party submitting has received the money, in consideration whereof he is to convey the estate sued for. III. 187
Where the husband, for a valuable consideration, covenants that his wife shall join with him in a fine; this court will enforce a performance of such covenant. III. 189
Difference between awards to pay money and to do any thing collateral; and why a bill in equity may be proper only to compel a performance of the latter. III. 190
Though a bill in equity lies to recover a small quit-rent, yet it ought to appear that the plaintiff has no remedy for the same at law; as where the lands out of which it is claimed are uncertain, or the days on which the same is payable, are uncertain also. III. 256, 257
Lord of a manor brings a bill against a tenant to hold a down belonging to

the manor, discharged of a right of common thereto; this an improper bill, in regard the plaintiff may by the same reason bring a separate bill against every tenant of his manor making the like claim. III. 257

A bill in equity lies not to compel the performance of an agreement to pay money in consideration of having stifled a prosecution for felony; *secus*, if to stop a prosecution at law for a fraud. III. 279

Where a title depends on the words of a will; this is as properly determinable in equity as by a judge and jury at *Nisi Prius*. III. 296

A bill will lie to secure the benefit of a contingent interest devised over; and in such case the costs shall be paid out of the assets of the testator, who by his will has occasioned the difficulty. III. 303

The bill charged, by way of amendment, matters which arose after the filing of the bill; and held this might be done either by way of supplement or amendment. III. 351

A bill lies to compel the delivery of an altar piece, or other curiosity, in specie. III. 390

In what Cases a Bill shall or shall not be taken pro confesso.

Taking a bill *pro confesso* has not been of long standing, it having formerly been the practice to make proof of the substance of the bill, though the defendant stood out to the last process: but latterly the practice has been, that if the defendant appears to a bill, and stands out in contempt to a sequestration, the cause is set down to be heard, and the record of the bill produced and taken *pro confesso:* but if time be given for a defendant to answer, though after the sequestration, and though the answer be reported insufficient, yet the bill shall not be taken *pro confesso*. II. 556

In what Cases Equity will or will not grant Relief upon Motion or Petition, but will put the Party to bring his Bill.

Where the right of guardianship is in dispute, the court will upon petition only, without bill or decree, make orders touching the determination thereof. II. 118

Assignee under a commission of bankruptcy dies very much indebted by bond, &c. and the creditors of the bankrupt petitioned that the administrator of the assignee might account before the commissioners, he having some of the bankrupt's effects in *specie* in his hands: but the administrator denying this upon oath, and swearing that there were debts by specialty beyond the assets, the court thought this proper for a bill, and not for a summary way of accounting before commissioners. II. 546

The court will not on motion or petition order an infant trustee to convey pursuant to 7 *Ann. cap.* 19, unless the trust appear in writing, but in such case will leave the *cestui que trust* to get a decree by bill. II. 549

A decree gained by fraud may be set aside by petition. III. 111

The right of guardianship of a child is not to be determined in so summary a way as on petition, and without a bill, any more than the court on a bare petition could order a trustee to deliver over possession of the trust estate to the *cestui que trust*. By the Lord *King*. III. 154

Quære tamen; *and see the Case of Mr. J.* Eyre *versus* the Countess of Shaftsbury, *and the Precedents there cited*, Vol. II. 118.

Bill amended and supplemental. See AMENDMENT.

Bill of Revivor.

If the defendant's time for answering be out, the court will order proceedings to be revived. So though the defendant by his answer insists that the plaintiff is not entitled to revive; for this ought to be shewn either by plea or demurrer: but if in such case it appears that the plaintiff had no title to revive, he cannot have a decree. III. 348

See also ABATEMENT.

Bill of Review.

On every bill of review the plaintiff must deposit 50*l.* in order to answer costs: but no need of the leave of the court for such bill of review, unless it be founded upon new matter, and then the leave of the court is necessary as well as the depositing 50*l.* II. 283

If a decree be obtained, and inrolled, so that the cause cannot be reheard, then there is no remedy but by bill of review, which must be on error appearing on the face of the decree, or on some new matter, as a release, or a receipt discovered since. III. 371

Bill for Discovery of Deeds. See DEEDS.

Bill to examine Witnesses in perpetuam rei memoriam. See WITNESSES.

Lis pendens.

A purchase *pendente lite*, though without actual notice, and for a valuable consideration, yet shall be set aside; in which case though the rule of equity be hard, it is in imitation of the common law, where in a real action if the tenant aliens, pending the writ, the judgment will over-reach the alienation: but as it is hard enough in some cases to make people take notice of a decree, it is harder still to oblige them to take notice of a pendency of a suit; for which reason if any flaw at the hearing be on the plaintiff's side, the court will not let him amend: but if the purchase *pendente lite* be fraudulent, and to elude the justice of the court, it ought to be highly discountenanced. II. 482

Acts of the court, as the commitment of a wardship, and in a cause then depending, to be taken notice of by every one at his peril, in the same manner as a *Lis pendens*. III. 117, 343

Who must be parties. See PARTIES.

Bill to perpetuate Testimony. See EVIDENCE.

BODY POLITIC.

See CORPORATION.

BOND OR OBLIGATION.

By a devise of all one's goods a bond will pass. I. 267

Bond or covenant to pay a sum of money on failure of issue of *A.* generally is good. I. 566

A son in plentiful circumstances gives his father a bond to pay him 120*l.* annuity for his life; this, if done freely and without coercion, good; and what words or circumstances will not be construed a coercion. I. 607

A bond is given to a creditor, who had petitioned against the allowance of the bankrupt's certificate, to pay the whole debt in consideration of the creditor's withdrawing his petition; equity will not relieve against it. I. 620

Two obligors in a bond bound jointly and severally, and one dies; the executors of the deceased obligor may be sued in equity without making the surviving obligor a party. II. 313

Bond given to a baron and feme during the coverture, will on the baron's death survive to the wife. II. 497

A. treats for the marriage of his son, and in the settlement of the son there is a power reserved to the father to jointure any wife whom he shall marry, in 200*l. per annum*, paying 1000*l.* to the son. The father treating about marrying a second wife, the son agrees with the second wife's relations to release the 1000*l.*, and does release it, but takes a private bond from the father for the payment of this 1000*l.*, equity will not set aside this bond, because it would be injurious to the first marriage, which being prior in time is to be preferred. III. 66

A father intrusts his heir apparent, then an infant, to the care of a servant; the heir comes of age; the servant takes a bond from the heir, which bond is secreted from the father, and

the heir has not wherewithal to pay the bond; equity will set aside the bond as obtained by fraud and a breach of trust. III. 129

But where a weak man gives a bond; if it be attended with no fraud or breach of trust, equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis*. III. 130

The having been in drink, is not any reason to relieve a man against any [bond or] deed or agreement gained from him when in those circumstances; for this were to encourage drunkenness; *secus*, if through the management or contrivance of him who gained the bond, &c. the party from whom it was gained, was drawn in to drink. *ibid.* (N)

Any voluntary bond is good against the executor, though to be postponed to a simple contract debt. III. 222

A bond is *prima facie* good evidence of a debt: but in case fraud appears, the obligee ought to prove actual payment of the consideration. III. 289

One being caught in bed with another's wife, gave the husband who caught him, and was about to kill him, a note for 100*l.* payable at a certain time. After which the money growing due, he who gave the note, excusing payment, gave his bond for the money; had the matter rested solely on the note which was thus gained by a man armed from one naked, and by duress, (notwithstanding it happened to be given in satisfaction for the greatest injury) equity would have relieved: but when the party had afterwards coolly, and without any pretence of fear, &c. entered into a bond to the husband, he thereby himself ascertained the damages, and was not entitled to relief. III. 294 (N)

A. having a wife who lived separate from him, afterwards courted and married another woman who knew nothing of the former wife's being alive: but this being discovered to the second wife, *A.*, in order to prevail on her to stay with him, gave a bond to her trustee to leave her 1000*l.* at his death, and afterwards died, not leaving assets to pay his simple contract debts; had this bond been given immediately on the discovery, and they had parted thereupon, the bond had been good, or had it been given to the second wife as a recompence for the injury done her, and she had upon that left him: but in regard it was given after the second wife knew the former was living, this was decreed to be worse than a voluntary bond, because given on an unlawful consideration, and to be postponed to debts by simple contract. III. 339, 340

A bond is given to *B.* in trust for *A.* who dies; the money due on the bond shall be paid in a course of administration. III. 342

There cannot be a gift of a bond by way of *donatio causâ mortis*, it being merely a *chose en action*, that will not pass by the delivery, but must be sued in the name of the executor. III. 358

A., by his interest with the commissioners of excise, gets an office in that branch of the revenue for *B.*, who in consideration thereof gives a bond to *A.* to pay him 10*l. per annum* as long as *B.* enjoys the place; equity will relieve against the bond. III. 391

Bonds for Marriage Brocage.

See MARRIAGE.

Bottomry Bond.

Where the obligor in a bottomry bond before the return of the ship becomes a bankrupt, the obligee cannot come in under the commission; though, if the ship returns before the bankrupt's estate be fully distributed, he shall come in *pro ratâ*; or if the ship returns after the bankrupt's certificate allowed, he will not be barred, provided he sets forth in the declaration the condition as well as the bond. II. 499

BOROUGH ENGLISH.

One seised of a copyhold in fee in na-

ture of *Borough English* has five sons, the youngest of whom dies leaving issue a daughter, and then the father dies, the youngest son's daughter is inheritable. I. 63

The custom of a manor was, that the copyhold lands of any tenant dying *seised* should descend to his youngest son, and a surrender is made of a copyhold to the use of *J. S.* and his heirs, who dies before admittance, his eldest son, and not his youngest, shall take these lands; *secus*, had it been laid to have been of the nature of *Borough English*. I. 66

One having *Borough English* lands is disseised and dies, this right to the *Borough English* shall descend to the youngest son. I. 67

Where lands of the nature of *Borough English* are in settlement, the unsettled reversion continues as part of the old estate, and shall descend in *Borough English* as before. III. 63

BOUNDARIES.

See PARTITION.

BROKERS.

See FACTORS.

BURNING IN THE HAND.

See CLERGY.

C.

CAPTION OF A FINE.

See FINE.

CASUALTIES.

On casualties happening between the articles for a purchase and the sealing of the conveyance, who shall bear the loss. I. 61

Where a former will of land is cancelled by the testator upon a presumption that a latter will is good and duly executed, which proves not to be so, in such case equity will relieve under the head of accident. I. 346

CERTAINTY.

Where a party charges his adversary with any thing criminal, it ought to be shewn with great plainness and certainty. III. 276

CERTIFICATE OF BANKRUPTS.

See BANKRUPTS.

CERTIFICATE OF THE CUSTOM OF LONDON BY THE RECORDER.

See LONDON, CUSTOM OF.

CERTIFICATE (OR REPORT) OF A MASTER IN CHANCERY.

See MASTER'S REPORT.

CERTIORARI.

See WRITS.

LORD CHANCELLOR OR LORD KEEPER.

Lord Chancellor or Lord Keeper determines in matters relating to idiocy or lunacy, not as Chancellor, &c. but by virtue of a royal sign manual. III. 108 (N)

See more title COURT OF CHANCERY, and JURISDICTION.

CHARITY AND CHARITABLE USES.

A devise by a nuncupative will by tenant in tail of a rent out of lands to a charity, void. I. 247

Vide DEVISE and WILL.

Devise by tenant in tail to a charity good, though no fine levied, or recovery suffered previous thereto. I. 248

Charity legacies that are pecuniary, shall on a deficiency of assets come into average as well as other pecuniary legacies. I. 423

In a suit for a charity for the arrears of

a rent-charge, it is not necessary to make all the ter-tenants of the land, out of which the rent issues, parties. I. 599

See also title PARTIES.

A parishioner no good evidence to prove a charity given to the parish; *secus* if only a lodger, and one who does not pay to the poor. I. 600

See also title EVIDENCE.

Two schools in one town, the one a free, the other a charity school for boys and girls; *A.* devises 500*l.* to the charity school; though both be charity schools, yet only that for boys and girls shall take. I. 674

One seised of some lands in fee, and being *cestui que trust* of other lands, devises all to *A.* for life, remainder to his first and second son in tail male (without going further) and after *A.'s.* death without issue male, then to a charity: though *A.* be tenant in tail until issue born, and may bar the charity with respect to those lands of which he has the legal estate, yet it was held otherwise as to the trust estate. I. 754

In case of a deficiency of assets charity legacies as well as others shall abate in proportion. II. 25

Governors of a charity, though not guilty of corruption, yet, if extremely negligent, to pay costs. II. 284

The king founds a school and endows it, appointing governors, who have the legal estate of this endowment vested in them, but there are no express words appointing them visitors; resolved a commission may issue to visit and call to an account those governors. II. 325

A power may be given to commissioners to make by-laws to regulate the charity: but where such power given to them is too extensive, it will be void only *pro tanto.* II. 327

Devise of 100*l.* in money, and of 50*l. per ann.* to *A.* and his heirs, and if *A.* die without heirs, then to a charity; *A.* dies without issue, living the testator; the will void as to the whole, and the charity cannot take. II. 369

A trustee of a term for a charity purchases the reversion in fee; he shall not cut down the timber; if he does, he must make satisfaction to the charity. II. 398

One seized in fee of a manor grants a rent in fee out of it to a charity for the support of several poor persons, and afterwards grants the manor to *J. S.* in fee; the nomination of the poor persons belongs to the heir of the grantor, and does not go with the manor. III. 145

A man founds a charity for alms-houses; the founder has a right of nomination of these alms people, but may forfeit it by a corrupt or improper nomination of such as are not fit objects of the charity, or by making no nomination at all; but this neglect of nomination must be after such time as the founder, &c. have had notice of the vacancy; and without proof of such notice, it is no fault. III. 146 (N)

Charity to those persons that are commonly called dissenting ministers good. III. 346

See also POOR.

CHILD, CHILDREN, YOUNGER CHILDREN.

The father the only judge of what is a proper advancement for his child. III. 285

See FATHER AND CHILD, PORTIONS.

CHURCH AND CHURCH-WARDENS.

Where there are two or three Church-wardens of a parish, each is a distinct officer, and may act, though the others die. II. 107

One devises 500*l.* to the church of St. *Helen, London;* this is good, and belongs to the church-wardens to be employed in the repairing and adorning the church. II. 125

CLERGY, AND THE BENEFIT THEREOF.

By the ancient common law of *England,* whoever had abjured the kingdom on account of felony committed by him,

if he did not depart straightway, or being gone, did return without licence, he had judgment to be hanged, except he was a clerk, and then he had his clergy. III. 39 (N)
In cases within benefit of clergy, the statute of 5 *Annæ*, takes away reading, and provides that the party shall be punished as a clerk convict. III. 443
The ordinary never acted as a judge, but as a minister only, on the allowance of clergy. III. 444
What is meant by a clerk convict, and how such a one is to be punished by 18 *Eliz.* *ibid.*
The original of benefit of clergy, the manner of trial of clerks convict before the ordinary, together with the ill consequences attending it. III. 447
The advantages that accrued to the party, in case upon the trial he was found not guilty. III. 448
What were the consequences of delivering over a clerk convict to the ordinary *absque purgatione facienda.* *ibid.*
Purgation taken away by 18 *Eliz.*, but the offender liable to be continued in prison for any time not exceeding a year, if the judge who tried him thinks fit. III. 449
How the words of 18 *Eliz.*, which express nothing of a pardon, came to be construed as such. III. 450
Burning in the hand where the offender is admitted to his clergy, notwithstanding what is asserted by the Lord *Coke* to the contrary, is part of the judgment, as appears from cotemporary reporters, as also from later authorities. III. 451
In what cases the stat. *4 Geo.* 1. *cap.* 9. in the room of burning in the hand, substitutes transportation; and how the latter is to be understood by way of condition precedent to a statute pardon, in like manner as the former was by 18 *Eliz.* III. 459
By 18 *Eliz. cap.* 7. actual burning in the hand, as well as the allowance of clergy, was necessary to discharge the prisoner from felony; and therefore, if before 4 *Geo.* 1. *cap.* 11. an offender, after clergy allowed, had escaped before he had been burnt in the hand, he would have continued a felon; and a stranger by unlawfully receiving him, &c. might have become accessary to his felony after the fact. III. 487
Where, by the delay or doubt of the court, a prisoner convicted of manslaughter has no opportunity of demanding his clergy, or if he has demanded it, and the court should make no record of it, this, on its being pleaded and shewn specially, shall not turn to the prejudice of the prisoner. III. 489
Alterations made by 4 *Geo.* 1. *cap.* 11. for transportation of felons, whereby the judgment of transportation, with regard to persons convicted of clergyable felonies, is plainly and clearly put only in the place of the judgment for burning in the hand, not in the place of actual burning. *ibid.*

COMMISSION.

A witness examined on a commission swears reflecting words; yet he ought not to pay costs, it being the commissioners' fault to take down such depositions. II. 406
A commission being granted to examine witnesses at *Algiers*, the plaintiff died, by which in strictness the suit abated, but the witnesses were examined there before notice given to the commissioners or witnesses of the plaintiff's death; the examination held regular, though one of the witnesses were yet living. III. 195
Witnesses examined in a commission after the demise of the crown, but before notice thereof, to be indicted of perjury, if they swear false. III. 196
After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses in order to falsify the defendant's examination; this tending to multiply causes, and to make them endless. III. 413

See also DEPOSITION, EXAMINATION, WITNESS.

COMMITTEE.

Committee of an infant heiress having given a recognizance that he should not suffer the infant to marry without the consent of the court, the form of this recognizance moderated, *viz.* that the infant shall not marry with the committee's privity, without the consent of the court. I. 698

See IDIOT.

COMMON.

Lord of a manor cannot bring a bill against a tenant, to the end that he may hold a down belonging to the manor discharged of the tenant's right of common therein. III. 257

COMMON, TENANTS IN.

See JOINT-TENANTS, and TENANTS IN COMMON.

COMMON RECOVERY.

See RECOVERY.

COMMON SEAL.

See CORPORATION.

COMPANY OR BODY POLITIC.

See CORPORATION.

COMPOS MENTIS.

Where a bill is brought to prove a will of land, the sanity of the testator is to be proved; *secus* of a deed of trust to pay debts. III. 93

No such thing as *non compos* in equity, if *compos* at law. III. 130

COMPOSITION.

Though, generally speaking, an executor or trustee compounding or releasing a debt, must answer for the same; yet, if it appears to be for the benefit of the trust estate, it is an excuse. III. 381

If an executor, mortgagee, guardian, or any one who is considered as a trustee, compounds debts it shall be for the benefit of the *cestui que trust.* III. 251, 252 (N)

See also DEBTS.

CONCEALMENT, COVIN, COLLUSION.

A devisee under a will defectively executed represents it to be duly executed, and for a small sum gains a release from the heir, such release set aside. I. 239

Where the first mortgagee is a witness to the second mortgage, though there be no actual proof of his knowing the contents thereof, yet from a presumption that he might have known the same, this shall postpone him. I. 394

In what manner a party releasing his right ought to be informed of his right, so as to be bound by such release. III. 321

CONCLUSION.

See ESTOPPEL.

CONDITION.

One devises lands to his wife for life, and after her death to his son in fee, upon condition to pay his daughter 1000*l.* within a year after the death of *J. S.*, with a proviso, that if the money be not paid, the daughter may enter and receive the profits till payment; *J. S.* dies, living the wife; the daughter is entitled to the 1000*l.*, and in default of payment, a sale of the reversion will be decreed. I. 478

In what cases a condition is to be performed *cy pres.* II. 628

Condition Precedent.

One by will gives an annuity to his granddaughter; but if she marries with the executor's consent, then a portion; she marries *sans* consent a man worth nothing; the husband not entitled to the money, the having married with the executor's consent being a condition precedent to the gift of the portion. I. 284

In what cases the statute of 4 *Geo.* 1. *cap.* 9. in the room of burning in the

hand substitutes transportation for seven years, and how the latter is to be understood by way of condition precedent to a statute pardon, in like manner as the former was by 18 *Eliz.* III. 459

Condition subsequent.

A. having a niece, an infant about the age of seventeen, devises to her the surplus of his personal estate, payable at twenty-one, and if she die before twenty-one, or marriage, the surplus to go over; decreed the niece should have the interest paid her in the mean time, the devise over being a condition subsequent. II. 419

One devises the residue of his personal estate to *J. S.* provided she marries with the consent of his two executors; on the death of one executor, the condition being a subsequent one is become impossible, and she may marry without the consent of the survivor. II. 626

An attornment could not be on a condition subsequent; for in such case the attornment would be good, and the condition void. III. 426

What is a Performance of a Condition.

Devise of a legacy to a feme, on condition that she marry a man of the name of *Barlow*. *A.* takes upon him the name of *Barlow*, and the feme marries him: this is a performance of the condition, and equity will not decree the husband to retain that name. III. 65

At common law, and before the statute *De donis*, when a man had devised lands to one and the heirs of his body; this was a conditional fee, and the possibility of reverter expectant thereon could not be limited over. III. 263 (N)

Condition broken.

A corporation aggregate cannot without their common seal empower their servant or agent to enter for a condition broken. III. 425

Condition or Covenant broken, how far relievable.

Mortgagor reserving six *per cent.* with proviso to take five if paid within three months after; if a great arrear, the court will not relieve; *secus* if but a small slip of time. I. 652

Though ordinarily where the husband, for a valuable consideration, covenants that his wife shall join with him in a fine, equity will enforce a performance of such covenant; yet if it can be made appear to have been impossible for the husband to perform the agreement, by procuring the concurrence of the wife; as suppose there are differences between them; and the husband offers to return all the money with interest and costs. *Qu.* If under these circumstances the court would not discharge the husband from the agreement? III. 189 (N)

And see INTEREST OF MONEY.

CONSENT.

See ASSENT.

CONSIDERATION, UNLAWFUL.

A. having a wife who lived separate from him, afterwards courted and married another woman who knew nothing of the former wife's being alive: but it being discovered to the second wife that the former was living, *A.* in order to prevail on the second wife to stay with him, some years afterwards gave a bond in trust to leave the second wife 1000*l.* at his death, and died, not leaving assets to pay his simple contract debts; if the bond had been given immediately on the discovery, or as a recompence for the injury done to the second wife, and thereupon they had parted, it had been good; but it being given on such an illicit consideration, as that of her living in adultery with *A.*, it was worse than a voluntary bond, and postponed to debts by simple contract. III. 339, 340

CONTEMPT.

An advertisement in the public prints, that whoever shall discover and make legal proof of a marriage (in relation to which there was a suit depending in this court) shall have 100*l.* reward; held to be a contempt of the court, and the party procuring it committed. I. 675

Suing the bail below, pending a writ of error in parliament, is a contempt and a breach of privilege. I. 685

A general act of pardon, though with an exception of all contempts then depending, which had been prosecuted at the charge of any private person, yet held to extend to contempts in marrying infant wards of a court of equity. I. 696

Where the husband was a lunatic, the wife, though an *Irish* peeress, committed for a contempt in not producing him. I. 701

The first process for contempt against a menial servant of a peer is a sequestration *nisi*. I. 535

The defendant is in contempt to a serjeant at arms for not answering, and then puts in an insufficient answer; if the plaintiff's clerk in court accepts the costs, it purges the contempt, and the plaintiff must begin again with an attachment the first process; but if the costs be not accepted, the plaintiff may go on in his process for contempt where he left off, for a further answer. II. 481

Marrying an infant ward of the court is a contempt, though the parties concerned in such marriage had no notice that the infant was a ward of the court. III. 116

So where one not a freeman of *London*, married a city orphan, though it did not appear that the party had any notice of his wife's being a city orphan, it was held he was punishable by the court of orphans. III. 118 (N)

Though the father has a right to the guardianship of his own children, and, if he can any way gain the custody of them, is at liberty so to do, provided no breach of the peace is made in such an attempt, yet it will be a contempt in him, and much more in any other person offering to take them when going to or returning from the court of chancery. III. 154, 155

And see INJUNCTION, PROCESS.

CONTINGENT INTEREST.

A contingent interest or possibility in a bankrupt is assignable by the commissioners. III. 132

A bill will lie to secure and have the benefit of a contingent interest. III. 303

See also POSSIBILITY.

CONTINGENT REMAINDERS.

See TRUSTEES FOR PRESERVING CONTINGENT REMAINDERS.

CONTRIBUTION.

See AVERAGE.

CONVEYANCE.

See DEEDS.

CONVOCATION.

The canons of a convocation do not bind the laity without an act of parliament. I. 32

COPYHOLD.

Copyhold lands do not differ in construction of law from freehold, and surrenders of copyholds must be governed by the same rules as conveyances at common law. I. 16

If a copyhold be devised to grandchildren without any previous surrender, equity will supply the want thereof. I. 61

Surrender of a copyhold to the use of baron and feme for their lives, *et hæredum et assignatorum* of the said baron and feme, and for default of such issue to the right heirs of *A.*, this is an estate in fee, and not an intail in the baron and feme; otherwise had it been the case of a will. I. 71

A. surrenders a copyhold by way of sale or mortgage, but the surrender is not presented in time, and *A.* becomes a bankrupt; this will bind the sale in equity. I. 280

If a copyholder sues in the lord's court by petition, and thereupon a wrong judgment is given, though no appeal or writ of error will lie of such judgment, yet the court of chancery will correct the proceedings. I. 330

Voluntary conveyance of a copyhold or other estate not helped in equity against an heir. I. 354

One devises all his real estate to pay debts, having part freehold and part copyhold, and dies without having surrendered the copyhold to the use of his will; if the freehold estate be not sufficient to pay debts, the copyhold, being real estate, shall be liable. I. 443

A copyhold was granted to the husband and wife and *J. S.* for their lives *successivè*, and the fine appeared by the rolls to be paid only by the husband and wife; *J. S.* decreed a trustee for the husband and wife and the survivor of them. I. 781

A copyhold surrendered to the use of a will shall pass by a will attested by two witnesses or one only. II. 258

But a trust or equity of redemption of a copyhold cannot pass by a will unless attested by three witnesses. II. 261

Quære tamen, for the contrary has been since determined.

Equity will supply the want of a surrender of a copyhold, in case it be devised for payment of debts, or a wife, or for younger children. II. 490

A. is a copyholder in tail, the lord grants the freehold of the copyhold to him in fee; the copyhold, though intailed, is extinct. III. 9

Quære autem, if *A.* be a copyholder in tail, remainder to *B.* in fee, and *A.* takes a grant of the freehold from the lord to him and his heirs, and dies without issue; is not *B.*, in whom there was once a vested remainder in fee of the copyhold premises, entitled to the same? III. 10 (N)

One by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by his will; the copyhold, though not surrendered to the use of the will, shall yet be applied to the payment of the debts, *pari passu* with the freehold. III. 96

Where one by will charges his copyhold land with the payment of his debts, equity will, in case the testator dies without having surrendered his copyhold to the use of the will, supply the want of a surrender; but if it be but an equitable charge, so that the legal estate of the premises descends to the heir, it seems that the creditors, in a bill brought by them in order to compel a sale for payment of their debts, should make the heir a party; otherwise the legal estate of the copyhold cannot be conveyed to a purchaser; though if it appears that the heir at law has, since the death of his ancestor, conveyed away all the copyhold estate, in such case the grantee of the heir being capable of conveying to the purchaser, it may not be necessary to make the heir a party. III. 97 (N)

A bill is brought by a lord of a manor to recover a fine for a copyhold, on a suggestion that the defendant was admitted by attorney, but sometimes pretends the attorney had no authority to take such admittance; the defendant answers as to part, but demurs as to relief; the demurrer held good. III. 151

A single copyholder is not relievable in equity for an excessive fine, because this is determinable at law; but, to avoid multiplicity of suits, several copyholders may join to be relieved against a general fine that is excessive. III. 155

If a copyhold be devised to a younger child, and no surrender to the use of the will, though by the same will there be other provision made for the child, yet such copyhold being part of the provision, the court will make it good, unless in a case where the eldest son and heir is totally disinherited; and though the devise be of a copyhold to a second son after the death of the eldest son without issue, equity will supply the want of a surrender. III. 283

If I have freehold lands and copyhold lands in *Dale*, and devise all my lands

and hereditaments in *Dale* to pay my debts; only my freehold shall pass, if that be sufficient; *secus*, if I have surrendered the copyhold to the use of my will. III. 322

An equity of redemption of a copyhold may be devised without being surrendered to the use of one's will. III. 358

CORONER.

By the ancient common law of *England*, when any one was about to abjure the realm for felony, he might within 40 days confess the felony, and take an oath to abjure the realm, before the coroner, who within 40 days from that time assigned him such a port as he chose, for his departure out of the kingdom. III. 38, 39 (N)

Where the sheriff is a party, or otherwise incapacitated, the coroner is the proper officer to whom all process is to be directed. III. 55

CORPORATION.

If a corporation would make use of one of their own members as a witness, they must disfranchise him. I. 595

A college restrained by their constitution from making any leases except for 21 years, and at a rack-rent, makes orders, recommending it to their successors to renew at less than the rack-rent; this not favoured, as tending to a breach of the statutes. I. 655

The signing of any contract for leasing (or whereby the revenues may be affected) by the master and fellows of the college, unless under the college seal, will not be binding to the college. I. 656

The parson is a corporation for taking of lands for the benefit of the church, as the church-wardens are for personal things. II. 126

Hudson's Bay Company and other corporations may by their by-laws make restrictions upon their stock, (*viz.*) that it shall first be liable to pay the debts due to themselves from their own members, or to answer the calls of the company upon their stock. II. 207

So a by-law of a company to seize a member's stock for a debt due from the member to the company is good: but if this debt be not due to the company, but to their trustee, then the by-law will not extend to it. II. 208

A corporation, without any express power by their charter, may of course make by-laws: but if they have a particular power to make by-laws for the management of their trade, they cannot make by-laws for carrying on projects foreign to the affairs of the corporation. II. 209

In the case of the *South Sea* Company, in whom the estates of the late directors are vested by act of parliament; where the statute of limitations was pleadable against the late directors, it is also pleadable against the Company, who stand but in such director's place. III. 310

A corporation aggregate shall have the benefit of the statute of limitations, as well as any private person. III. 143

The secretary and book-keeper of the *East India* Company were made defendants to a bill for discovery of some entries and orders of the Company; the defendants demurred, for that they might be examined as witnesses; also because their answer could not be read against the Company; the demurrer over-ruled, lest there should be a failure of justice, in regard the Company are not liable to a prosecution for perjury, though their answer be never so false. III. 310

One with lemon juice takes out a receipt written on the inside of a bank-note, but called an indorsement; this held to be a rasing an indorsement within 8 and 9 *W.* 3. *cap.* 19., and to be felony without clergy. III. 419

A corporation aggregate cannot answer but under their common seal. III. 423

A corporation aggregate can do nothing of consequence, or that is not an ordinary service, without deed. *ibid.*

Cannot without deed empower a third person to seize goods for their use as forfeited. III. 424

Nor to enter for condition broken. III. 425
Nor to make an attornment. III. 426

COSTS.

On a *scire facias* to repeal a charter, the defendant shall pay costs for a new trial. I.224
Costs not always to follow the event of the cause; as where the money was found due to the defendant upon account, yet it appearing to be much less than had been claimed by the defendant's answer, in that case the defendant was allowed no costs. I. 376
Mortgagee shall not onerate his pledge with costs which he has occasioned by an unjust defence. I. 395
An heir at law, or even an heir male to the honour of the family, if there be probable cause to contend for the family estate, not to pay costs. I. 482

See also HEIR.

Upon the attorney's or solicitor's appearing to be guilty of a gross neglect, the court will order him to pay the costs. I. 593
Legatee or creditor coming in before a master for his legacy or debt shall have his costs, and why. II. 27
In case of an issue out of Chancery, it is proper to move that court for costs in not going on to trial, or to move there for a special jury. II. 68
Governors of a charity, though not guilty of corruption, yet if extremely negligent, to pay costs. II. 284
In a bill brought by a devisee against an heir to prove a will, the heir cross-examines the plaintiff's witnesses, and refuses to release his right; yet the heir shall have his costs given him on motion; otherwise if he examines witnesses of his own. II. 285
An infant by his *prochein amy* brings a bill, and never stirs after he comes of age, and the bill is dismissed: the infant is liable to pay costs, and must take his remedy over against the *prochein amy*. II. 297
At law an infant is liable to pay costs if the judgment be against him. II. 298
On a bill to settle the boundaries of a manor, it was decreed that each party should give to the other a note of their boundaries, in order to have the matter tried in a feigned issue; and the issue being found for the defendant on three trials, he was not only allowed the costs of all the trials at law, but also those in equity; in regard the defendant had no bill, and the plaintiff might have tried it at law without coming into equity. II. 376
On a bill of partition no costs on either side, because it is for the benefit of both parties. *ibid.*
Where the cause is brought on only on bill and answer, if the bill is dismissed against any of the defendants, there only 40*s*. costs are to be paid: but if the plaintiff has a decree against the defendant, though only on bill and answer, in such case costs must be taxed. II. 387
A witness examined at a commission swears reflecting words; yet he ought not to have paid costs, it being the commissioners' fault to take down such deposition. II. 406
If an ambassador's servant brings a bill, he must give security to answer costs as being a person privileged. II. 452
The defendant is in contempt to a serjeant at arms for not answering, and then puts in an insufficient answer; if the plaintiff's clerk in court accepts the costs, it purges the contempt, and the plaintiff must begin again with an attachment, the first process; but if the costs be not accepted, the plaintiff may go on in his process for contempt where he left off, for a farther answer. II. 481
Baron and feme bring a bill to redeem a mortgage; the defendants plead to the bill, and the plea being over-ruled, costs are given to the plaintiff; baron dies, the feme by survivorship shall have the costs. II. 496
Where the suitor has paid the officer his fee, and he neglects his duty, by which means the suitor's process becomes irregular, the suitor is to pay costs to the other side, but shall recover them from the officer. II. 658
And though the officer in such case dies,

his executor will be ordered to pay them out of assets, it being matter of contract, and therefore not dying with the person. II. 658

Where one that sues both at law and in equity for the same thing, or being put to make his election, chooses to proceed at law, his bill is to be dismissed with costs. So also where one makes a special election to proceed at law as to part, and in equity as to other part, with regard to what the plaintiff elects to proceed at law, his bill is to be dismissed with costs. III. 90 (N)

A bare trustee is a good witness for his *cestui que trust;* but not an executor in trust, as he is liable to be sued by creditors, and to answer costs. III. 181

One ought not to be condemned to pay costs in this court for insisting on a right which the law gives him. III. 205

Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs shall be paid out of the assets of the testator, who by his will has occasioned the difficulty. III. 303

A trustee misbehaving himself, ordered to pay costs out of his own pocket, and not out of the trust estate. III. 347

One may demur anew at the bar, *ore tenus:* but then on the demurrer being allowed, he cannot have his costs. III. 371

Not agreeable to the present practice to pay costs for a demurrer, insisted on at the bar *ore tenus.* *ibid.*

An heir at law is made a defendant, and insists on his title; he shall have costs, though it goes against him: but if an heir at law be plaintiff, and miscarries in his suit, he shall not have costs; but, on his suit appearing to be groundless, shall pay costs. III. 373

COVENANT.

See Agreement.

Covenant broken, and how far Relievable.

See title Condition.

COVERTURE.

See Baron and Feme.

COUNTY.

In an indictment against one as accessary after the fact to a felony, by receiving, &c. the principal who was outlawed or attainted in the same county, it ought to appear that the party receiving, &c. did it *sciens* or *scientèr;* otherwise it will not amount to an absolute presumption, so as to excuse such omission. III. 496

In criminal cases, though the county be in the margin, yet the place where the fact is supposed to be done must be laid to be done in *com. prædict.;* otherwise in civil cases. *ibid.*

COURTS.

See Jurisdiction.

Court of Chancery, or Equity.

Court of Chancery in vacation time may grant prohibitions returnable in *B. R.* or *C. B.* I. 43, 476

If a copyholder sues in the lord's court by petition, and thereupon a wrong judgment is given, though no appeal or writ of error will lie of such judgment, yet the Court of Chancery will correct the proceedings. I. 330

An executor proves a will, wherein one of the legacies is forged; this fraud is not examinable in Chancery. I. 388

No motion can be made on the petty-bag side of the court of chancery after the last day of the term, though as to other purposes on the equity side, the last day of the term continues till the motions are over. I. 522

So where the last seal continued three days, the whole was looked upon as a continuance of the first day of the seal. *ibid.*

The Court of Chancery only proper to compel an execution of a trust, and consequently a distribution of the undisposed surplus of a personal estate. I. 549

Guardians appointed by will according to the statute of 12 *Car.* 2. *cap.* 24.

have no more power than guardians in socage, and are but trustees, on whose misbehaviour, or giving occasion to suspect their behaviour, the Court of Chancery will interpose. I. 704

If a father in low circumstances endeavours to marry his own child to one who has an estate not any ways proportionable, the Court of Chancery will interpose. I. 705

Guardians are recommended by will to act with the advice of *J. S.*, and *J. S.* is afterwards attainted, this superintendency devolves upon the great seal. I. 706

That right which the king has as *pater patriæ*, to take care of his subjects in cases of charities, idiots, lunatics, and infants, falls under the direction of the Court of Chancery, which in consequence thereof has used upon petition only, without any bill or decree, to make orders touching the determination of such right. II. 118

Court of Chancery has cognizance of fraud as well as the common law courts. II. 156

The Court of Chancery in *England* may grant a sequestration against the defendant in *Ireland;* but it must be after a sequestration taken out here, and *nulla bona* returned. II. 261

Court of Chancery will oblige all to take notice of its decrees as much as of judgments. II. 483

Court of equity will enforce a distribution of a freehold estate, though the spiritual court cannot. III. 102

A weak man gives a bond; if it be attended with no fraud or breach of trust, equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis;* neither will equity measure people's understandings or capacities. III. 130

No such thing as being *non compos* in equity, if *compos* at law. *ibid.*

Equity will not relieve a man against any deed or agreement gained from him when in liquor, merely for that reason, in regard this were to encourage drunkenness; *secus*, if through the management or contrivance of him who gained the deed, &c. the party from whom it was gained was drawn in to drink. III. 130 (N)

Heirs, even when of age, are under the care of a court of equity, and then want it most, the law taking care of them till that time. III. 131

Where *A.* is tenant for years, remainder to *B.* for life, remainder to *C.* in fee, and *A.* is doing waste; *B.*, though he cannot bring waste, as not having the inheritance, is yet entitled to an injunction in equity. III. 268 (N)

Where husband and wife sue for a legacy given to the wife, equity will not compel the payment of it unless the husband makes some settlement on the wife. III. 202

A good rule in equity as well as at law, that where to a suit there are never so many defendants, if the plaintiff cannot give evidence against a defendant he may be called as a witness for a co-defendant. III. 288

Where a title depends upon the words of a will, this is as properly determinable in equity, as by a judge and jury at *Nisi Prius*. III. 296

A court of equity delights to do complete justice, and not by halves; as to make a decree against the heir, and leave him to prosecute another suit against the executor; wherefore in order to do such complete justice, where both are liable to the plaintiff's demand, it requires that both should be made parties. III. 334

A court of equity endeavours to prevent a multiplicity of suits. III. 157, 334

Matters of fraud are cognizable as well in equity as at law. III. 279

Court of Chancery on the Petty-Bag side.

The plaintiff gets judgment in the petty-bag, after which he is stopped by an injunction. The year and day pass; the plaintiff, though hindered by the injunction, yet cannot sue out execution without a *scire facias*. III. 36

Court of Exchequer.

Upon an outlawry the plaintiff in the action ought to get a grant or lease of

the defendant's interest under the exchequer seal. I. 445, 446

Court of King's Bench.

One who had been a prisoner in *Newgate* for debt, but since removed to the *Fleet*, is excommunicated; the Court of Chancery will not direct the cursitor to make out a writ of *excommunicato capiendo* to the warden of the *Fleet;* but this writ may be directed to the sheriff, who may return a *non est inventus;* and on this return the Court of King's Bench may grant a *habeas corpus*, and thereon charge him with an *excommunicato capiendo.* III. 53

All writs of *excommunicato capiendo* must be returnable in the King's Bench. III. 55

A reasonable practice in the King's Bench, if nothing has been offered, either by threatening or other misbehaviour, within a year and a day after the taking up of the party, by him or on his behalf, that he ought to be discharged. III. 103

See more under the following title.

Courts, Spiritual, Ecclesiastical, or Christian.

The spiritual court has jurisdiction of grammar schools; but in case of a libel for teaching school generally without licence, if it does not appear what school, the temporal courts will grant a prohibition. I. 29

A *mandamus* lies to the spiritual court to direct them to do right, as a prohibition does to stop them from doing wrong. I. 47

An injunction upon an attachment, or *dedimus*, &c. does not extend to stay proceedings in the spiritual court without special order. I. 301

An executor proves a will of a personal estate, wherein one of the legacies is forged; the spiritual court having a proper jurisdiction of this matter, the executor is without remedy in equity. I. 388

The spiritual court has no power to make a translation of a will. I. 527

The spiritual court cannot compel a distribution of the undisposed surplus of a personal estate, and why. I. 549

The spiritual court has power to determine concerning the right of proxies, or procurations. I. 657

Where a thing is claimed by custom in the spiritual court, it must be intended according to their law, by which forty years make a custom or prescription. I. 663

The statute of distribution made in favour of the practice of the spiritual court. II. 441

The spiritual court cannot enforce a distribution of a freehold estate. III. 102

One devises the surplus of his personal estate to his four executors; though by the rule of the spiritual court (which has a concurrent jurisdiction in cases of legacies) survivorship does not take place; yet this coming into *Westminster Hall*, must be determined according to the rules of the common law, and on the death of one of the legatees shall go to the survivors. III. 115

A lease granted to one and his heirs for three lives is a real estate; and though by the statute of frauds it is made liable to debts, yet it is only such debts as bind the heir; and where the spiritual court set aside a will, disposing (*inter al'*) of such estate as revoked, this sentence held not to affect the devise of such real estate. III. 166

In the spiritual courts all restraints on marriage are void; the rule there being, that *maritagium debet esse liberum.* III. 238

Difference of opinion between the common lawyers and the civilians in the point, whether, where there are two executors, and one renounces, he who renounced is still at liberty to accept of the executorship; or whether a renunciation once made, though only by one of them, is peremptory. III. 251 (N)

In the case of a divorce *a mensa et thoro*, baron and feme live separately, and the wife has a child; this is a bastard, for the court will intend obedience

has been paid to the sentence during this time. III. 275

The spiritual court has sometimes refused to grant the probate of a will to an executor of no substance, and who has absconded for debt, unless he would give security for a due administration of the assets; but in these cases the court of *B. R.* has enforced the granting of a probate by a peremptory *mandamus*. III. 337 (N)

Court of Orphans.

One, not a freeman of *London*, married a city orphan; and though it did not appear that the party had any notice of his wife's being a city orphan, yet it was held such person was punishable by the court of orphans. III. 118 (N)

Inferior Courts.

All judgments, even in the inferior courts of law, are to be taken notice of by executors, so that if they pay any bonds before such judgments, it is at their peril. III. 117

Courts Foreign.

Administration granted in a foreign court (as in *Paris*) not taken notice of in our courts. III. 371

CROWN.

See PREROGATIVE.

CURTESY, TENANT BY.

One seised of lands in fee had two daughters, and devised his lands to trustees in fee, in trust to pay his debts, and to convey the surplus to his daughters equally; the younger daughter married, and died leaving an infant son and her husband surviving; on the eldest daughter's bringing a bill for a partition, decreed that the husband of the youngest daughter should be tenant by the curtesy. I. 108

Tenant by the curtesy not so much favoured in law as dower. II. 703, 704

Qu. If a Papist may not be tenant by the curtesy, (notwithstanding the 11 & 12 *W.* 3. made to prevent the growth of Popery,) that estate being cast on him by act of law, and not by purchase. III. 49 (N)

A man may be tenant by the curtesy of a trust as well as of a legal estate. III. 234

A husband does not forfeit his tenancy by the curtesy on leaving his wife and living in adultery, as a wife forfeits her dower by elopement, &c. III. 276

CUSTOMS, FOREIGN.

See title FOREIGN CUSTOMS.

CUSTOMS OF LONDON.

See LONDON, CUSTOM OF.

D.

DEBTS, DEBTOR, AND CREDITOR.

Where the husband receives money which by marriage articles was covenanted to be laid out in land and settled, and afterwards misapplies it, his assets are liable to make this loss good, not as a breach of trust, or as money received and misapplied; but by reason of the articles it is a debt by specialty. I. 131

A freeman of *London* gives a note by which he owns himself indebted to his brother and heir, but his brother knows nothing of it, and the freeman keeps this note always in his own custody, which on his death was found among his papers; adjudged a void note, and as a matter *intended* and not *perfected*. I. 204

See also under title VOLUNTARY.

One seised in fee of some lands, and possessed by lease for years of other lands, devises the fee to *A.* and the leasehold to *B.*, and dies indebted by bond; on a deficiency of assets, both the devisees shall contribute to the payment of the bonds; but if the devise had been to *A.* of all the rest of his estate, then *A.* should have paid all the debts. I. 403

One seised in fee, and indebted by bond in which his heirs are bound, devises his lands to *A.* for life, remainder to his first, &c. son in tail, remainder over; in a bill brought by the bond creditors, the court will not decree the devisee for life to account for the profits, but only to keep down the interest; also the court will decree a sale to satisfy the bonds, though the lands be not devised for payment of debts. II. 234

One owes a debt by simple contract. Six years pass, whereby the debt is barred; after which the debtor by will charges his lands with the payment of all his debts, and dies: it seems this debt is revived. III. 84

Qu. If a man were to devise his personal estate to pay his debts, whether would this revive a debt barred by the statute of limitations? III. 89 (N)

A will begins, "As to all my worldly "estate, my debts being first paid, "I give, &c." The real estate is liable to the debts, nothing being devised till the debts are paid. III. 91, 359

In a devise of lands to pay debts, if the creditor brings a bill to compel a sale, the heir is, generally, to be made a party; *secus* in the case of a trust created by deed to pay debts. III. 92

Where a bill is brought to prove a will of land, the sanity of the testator must be proved; *secus* in the case of a deed of trust to sell for payment of debts. III. 93

One by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by his will; the copyhold, though not surrendered to the use of the will, shall yet be applied to the payment of debts, *pari passu* with the freehold. III. 96

If I charge all my lands with payment of my debts, and devise part to *A.* and other part to *B.* &c. the creditors cannot be paid out of the lands till the Master has certified what the proportion is which each is to contribute; but if the Master certifies that the debts will exhaust the whole real estate, then the creditors may proceed against any one devisee for the whole. III. 99

A lease granted to one and his heirs for three lives is a real estate; and though by the statute of frauds it is liable to pay debts, yet it is only such debts as bind the heir. III. 166

A. lent money on bond to *B.*, who dying intestate, *C.* took out administration to him; after which *C.* dying, *A.* took out administration *de bonis non* to *B.*; in this case *A.*, it was allowed, might, out of the assets of *B.*, have retained for such bond debt contracted before he took out administration; and though he happened to die before he made any election in what particular effects he would have the property altered; yet as the court presumed he would have elected that his own debt should be first paid, therefore, the executors of *A.* in accounting for the assets of *B.*, were permitted, on the account, to deduct to the amount of the money lent by *A.* to *B.* III. 184. (N)

A bond or mortgage is *primâ facie* a good evidence of a debt; but in case fraud appears, the obligee, &c. ought to prove actual payment. III. 289

Express words, or words tantamount, are requisite to exempt the personal estate from payment of debts, that being the natural fund for that purpose. III. 325, 333, (N)

A husband voluntarily, and after marriage, allows the wife for her separate use, to make profit of all butter, eggs, pigs, poultry, and fruit, beyond what is used in the family; out of which the wife saves 100*l.* which the husband borrows, and dies; equity will allow this agreement to encourage the wife's frugality, and she shall come in as a creditor for this 100*l.*, especially there being no defect to pay debts. III. 337

Every mortgage, though there be no covenant or bond to pay the money, implies a loan, and every loan implies a debt; therefore, an heir of a mortgagor shall compel an application of the personal estate to pay off a mortgage, though there was no covenant, &c. from the mortgagor. III. 358

Composition of Debts.

Equity will assist a composition of a debt if obtained without fraud and upon a fair representation. I. 751

If on the consent of the wife and her trustees, and in order to a composition with the husband's creditors, the court orders part of the trust-money to be paid to the creditors thus consenting to discharge him of the debts, any private notes, &c. taken by any of the creditors for part of their debts besides their share with the rest of the creditors, will be set aside. I. 768

The Order and Priority in which Debts are to be paid.

Any voluntary bond good against the executor, though to be postponed to a simple contract debt. III. 222

All judgments, even in the inferior courts of law, are to be taken notice of by executors, so that if they pay any bonds before such judgments, it is at their peril. III. 117

A. who had a wife that lived separate from him, afterwards courted and married another woman, who knew nothing of the former wife's being alive; but it being discovered to the second wife that the former was living, *A.* in order to prevail on the second wife to stay with him, gave a bond to a trustee of the second wife to leave her 1000*l.* at his death, and died, not leaving assets to pay his simple contract debts; this bond being given on such an illicit consideration, was held to be worse than a voluntary bond, and there being a deficiency of assets, to be postponed to all the simple contract debts III. 340

One possessed of a term for 1000 years, articles to purchase the inheritance, and by will gives 3000*l.* to his daughter, and makes his son executor, and dies; the son assigns the term in trust to attend the inheritance, of which he takes a conveyance in his own name. Afterwards the son acknowledges a judgment to *A.* and mortgages the same lands to *B.* and dies insolvent; *A.* shall be first paid his judgment, then *B.* shall be paid his mortgage; after which, the daughter (being administratrix to her brother) is entitled to her legacy of 3000*l.* in preference to the simple contract creditors. III. 328

A. owes money by several judgments and bonds, and dies intestate. His administrator pays the judgments and some of the bonds, and pays more than the personal estate comes to; what the administrator paid on the judgments must be allowed him; but as to what he paid on the bonds, he must come in *pro ratâ* with the other bond creditors out of the real assets. III. 400

A debt due by a decree of the court of chancery is equal to one due by a judgment at law; and where an executrix of *A.* who was greatly indebted to divers persons in debts of different natures, being sued in chancery by some of them, appeared and answered immediately, admitting their demands, (some of the plaintiffs being her own daughters,) and others of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of chancery, being for a just debt, and having a real priority in point of time, not by fiction and relation to the first day of term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings against her stayed by injunction. III. 401, 402, (N)

And see Assets, Executor, Trust *for Payment of Debts.*

DECREE.

If after a decree a *caveat* be entered to stay the signing and inrolling, it stays the signing twenty-eight days after the presenting the decree to the *Lord Chancellor* to be inrolled, and notice given by the *Lord Chancellor's* Secretary to the clerk on the other side. I. 609

Where matters have been examined in equity and determined, the Court is cautious of unravelling former decrees, agreements, or releases. I. 723

On a bill to set aside a decree against an infant for fraud, if the same be not fraudulent, though in many respects not so equitable, the Court will not set it aside. I. 734

If, after a decree to account, an executor or administrator does not revive within six years, this is not within the statute of limitations. I. 742

On suggestion of a gross fraud, the court will, upon an original bill, overrule a plea of a decree, and a report made and confirmed thereon, if the suggestion of fraud be not denied. II. 73

The court will not compel a purchaser under a decree to accept a doubtful title. II. 201

The Court of Chancery will oblige all to take notice of its decrees as much as of judgments. II. 483

One allowed the best purchaser under a decree, is ordered to pay the money: this not a debt due by decree, but by order of court. II. 621

Where there is a decree for a debt, and the defendant dies, such decree does not bind the legal assets descended to the heir as a judgment does. *ibid.*

The only way upon a decree for a debt to affect land is to proceed for a contempt to a sequestration, but such sequestration abates by the death of the party, which an extent does not. *ibid.*

The court will not without difficulty set aside a security made under a decree, and approved of by the Master. III. 8

No appeal lies from a decree or order of the Lord Chancellor or Lord Keeper in cases of idiocy or lunacy, but to the king in council. III. 108

A decree gained by fraud may be set aside by petition, as a judgment at law by motion; *a fortiori* may such decree be set aside by bill. III. 111

If a feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession under this decree, and marries; the husband may assign such interest, for it is in nature of an extent. III. 200

A trust estate was decreed to be sold for the payment of debts and legacies, and to be sold to the best purchaser. *A.* articles to buy the estate of the trustees, and brings a bill against them to perform the contract; the trustees disclose this matter; the court will make no new decree, but leave the former decree to be pursued. III. 282

No one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree. III. 311 (N)

In case of a decree of foreclosure against an infant, though the infant has six months after he comes of age to shew cause, &c. yet he will only be admitted to shew errors in the decree, not to ravel into the account, nor to redeem. III. 352

If a decree be obtained and enrolled, so that the cause cannot be reheard, then there is no remedy but by bill of review, which must be on error appearing on the face of the decree, or on new matter as a release, or a receipt discovered since. III. 371

A decree is equal to a judgment at law; and where in obedience to a decree a defendant executrix had paid away assets to some creditors, after which other creditors obtained judgments at law against her, to which the decree was not pleadable; the court of Chancery protected the executrix in paying obedience to the decree. III. 401, 402 (N)

Parties bound or not by a Decree.

A decree shall not bind a remainderman who is no party. I. 91

After a decree *nisi causa* against an infant on such infant's coming of age, and before the decree made absolute, he may put in a new answer. I. 504

See title Answer.

DEEDS, WRITINGS, CONVEYANCES, AND ASSURANCES.

A conveyance by a weak man for a small consideration set aside. II. 203

A different consideration from what is expressed in the deed not to be averred; and though the consideration of blood be a good one, yet that not to be regarded, if money, or the grant of an annuity, be expressed in the deed; also a good objection that the grant is to two and only one of kin. II. 204

Evidence of fraud, when no proof that any instructions were given for preparing the deed by the grantor, or when the deed was not read to him. II. 205

A deed is proved in the cause, and referred to in the depositions; yet the court will not order that the other side shall have leave to inspect it before the hearing, as this would enable him to pick holes in it. II. 410

In a bill purely for the discovery of a deed, or to have it delivered up, there is no need of annexing an affidavit that the deed is lost; *secus*, if relief be prayed generally, as to recover the money on a bond. II. 541

The defendant's witness proves a deed, and refers to it in his deposition; the plaintiff cannot compel the defendant to produce the deed at the hearing, the reference thereto not making it part of the deposition. III. 35

Sed quære, et vide III. 364

The court never orders a will to be proved *vivâ voce* at the hearing as they do a deed. III. 93

Though it be proper to prove a will in equity, yet it is not absolutely necessary so to do, any more than it is to prove a deed in equity. III. 192

The bare sealing a deed without any covenant from the party so sealing, &c. not effectual to declare the uses of a recovery, nor to transfer any right. III. 206

See also 210 (N)

Where there is a subsequent mortgagee without notice, who has possession of the title deeds, the first mortgagee shall not compel a delivery of the writings from him, without paying him his mortgage money. III. 280

The first mortgagee permits the mortgagor to keep the title deeds, and the mortgagor shewing a fair title, mortgages the premises to a second mortgagee, to whom he delivers the deeds; the first mortgagee is accessary to the drawing in of the second. III. 281

But a slight equity for an heir to say he wants the writings, unless he claims under some deed of intail concealed from him by the defendant. III. 296

Where a subsequent conveyance does not revoke a will. III. 346

The plaintiff claimed by virtue of a remainder in tail expectant on tenant in tail's dying without issue, and was the heir male of the family. The defendants were sisters and heirs general of the tenant in tail, and by their answer shewed that their brother, the tenant in tail, suffered a recovery, declaring the use to himself in fee, and refer to the deeds in their custody; the court ordered, before the hearing, the defendants to leave with their clerk in court the deeds making the tenant to the *præcipe*, and leading the uses of the recovery. III. 363

Deeds, Conveyances and Assurances, Construction and Operation of them.

Devise to *A.* (a woman) for life, and then to be at her disposal, provided it be to any of her children by her first husband. *A.* with an after-taken husband does by lease and release and fine convey the premises to a trustee and his heirs, to the use of herself for life without impeachment of waste, remainder to her daughter by a first husband and the heirs of her body, remainder to her son by her first husband and his heirs; this adjudged a good execution of the power. I. 149

Deeds or settlements solemnly executed, not to be set aside by the parties' parol expressions declared against it. I. 482

Deed of appointment in consequence of a will, and referring thereto, construed as part of the will. I. 530

Deeds lost or concealed.

Where an heir suppressed a deed or will, formerly the Court decreed the party claiming under such deed, &c. to hold and enjoy against such suppressor: but now the Court goes

farther, and decrees the suppressor to convey. I. 731

The contents of a deed or will suppressed, if uncertain, to be taken more strongly against the suppressor. *ibid.*

How far courts of equity have gone in case of suppression of deeds. II. 748

Deeds cancelled.

One makes a voluntary settlement on her nephew *A.*, in which there is no power of revocation, keeping the deed in her custody; afterwards the nephew's father gets an attested copy of this settlement; then the aunt burns such settlement, and settles the premises on her nephew *B.* delivering the said settlement into *B.*'s custody: the nephew *A.*'s bill to establish the first settlement dismissed with costs; upon which the second nephew *B.* claiming under his settlement, and bringing a bill to have the attested copy delivered up, obtains a decree for that purpose. I. 577

Deeds obtained by Duress, Compulsion, &c.

Husband before marriage covenants to release the guardian of the intended wife of all accounts; this not binding, from a presumption that it was not made freely. I. 118

See *Marriage-brocage bonds.*

Son in plentiful circumstances gives his father a bond to pay him 120*l.* annuity for his life, this, if done freely and without coercion, good; and what words and circumstances will not be construed a coercion. I. 607

See *ante* BONDS.

There is a diversity between a deed, and a will gained from a weak man, and upon a misrepresentation; in regard equity will set aside the former but not the latter. II. 270

Deeds obtained through Fraud or Breach of Trust. See BONDS.

Deeds to lead the Uses of Fines and Recoveries. See FINE AND RECOVERY.

DEFENDANTS.

In what special cases the answer of one defendant may be read against the other. I. 300

They only are defendants to a bill against whom process is prayed. I. 593

If there be never so many defendants to a bill, if the plaintiff cannot give evidence to affect a defendant, he shall be admitted as a witness for a co-defendant. III. 288

Why the answer of one defendant cannot be made use of against another. III. 311 (N)

See also PARTIES.

DEMISE LE ROY.

Witnesses examined in a commission after the demise of the crown, but before notice thereof, liable to be indicted for perjury, if they swear false. III. 196

See 1 Annæ, stat. 1. cap. 8. sect. 5. *whereby this matter is now put out of dispute, it being by that act provided,* inter al' "*That no commission* "*or proceedings issuing out of any* "*court of equity shall be discon-* "*tinued by the death of her majesty* "*or any king or queen.*"

DEMURRER.

If one be made a plaintiff immaterially, and without being any ways interested in the cause, the Court will not make an order to examine such person *de bene esse*, but the defendant ought to have demurred. I. 595

The defendant has leave to plead, answer, and demur, but not to demur alone; the defendant demurs, and answers only by denying combination, or some such trifling matter; demurrer set aside. II. 286

On a demurrer to a bill, if the demurrer be allowed, the plaintiff may amend his bill. *Qu.* II. 300

On time given to answer, the defendant cannot put in a demurrer. II. 464

A defendant cannot demur and plead, or demur and answer to the same

part of a bill; for the plea, &c. over-rules the demurrer. III. 80
If a demurrer be to part of the plaintiff's bill, and an insufficient answer to the residue; yet the plaintiff cannot except until the demurrer is argued. III. 326
If one demurs to a bill, and that demurrer be ill, the defendant may shew a fresh cause of demurrer at the bar *ore tenus:* but if that be good, the defendant cannot have his costs. III. 371

DEPOSITIONS.

A witness was examined who at that time was disinterested, but afterwards became interested and plaintiff in the cause, his depositions allowed to be read. I. 288
A witness, sworn and examined to several of the interrogatories, dies suddenly before he has signed his examination; these depositions no evidence. I. 414
Defendant after publication examines a witness, and on the usual affidavit, that neither he, his clerk or solicitor, had seen the depositions, gets an order to re-examine this witness: but the witness dies before a re-examination; the Court gave leave to the defendant to make use of the former depositions. I. 415
A witness examined at a commission swears reflecting words; yet he ought not to have paid costs, it being the commissioners' fault to take down such deposition. II. 406
A deposition of a witness amended after publication. II. 646
The defendant's witness proves a deed, and refers to it in his deposition; the plaintiff cannot compel the defendant to produce the deed at the hearing, the reference thereto not making it part of the deposition. III. 35
Sed Quær. et vide 364.

And see EVIDENCE, EXAMINATION, WITNESS.

Depositions de bene esse.

Court refused to publish depositions *de bene esse*, in order to compare them with the depositions in the same cause taken on an examination in chief. I. 567
The reason of examining a witness *de bene esse.* I. 568
Where a prosecution for perjury will lie on a deposition taken *de bene esse.* *ibid.*

DESCENT.

Heir not always, and of necessity, to be intended a word of limitation. I. 59
So where the devise was to the heirs male of *J. S.* begotten. *J. S.* having a son, and testator taking notice that *J. S.* was then living; this was held a sufficient description of the testator's meaning, and the son allowed to take, though strictly speaking he was not heir. I. 229
All lands in *England* at first descended in gavelkind: but after the conquest, when knight-service tenures were introduced, and the whole descended to the eldest son, the daughter of the eldest, *jure representationis*, was preferred to the youngest son. I. 64
Father or mother may be cousin to their son, and as such, take by descent notwithstanding the relation of father, &c. II. 613
Lands cannot ascend from the son to the father, but shall rather escheat. II. 734
Trust-estates are to be governed by the same rules of descent as legal estates. II. 713, 736
A Papist above the age of 18 and a half is capable of inheriting or taking lands by descent. III. 49
The reversion in fee, or such part as is unsettled, is part of the old estate; and if the owner had the land as heir of the mother, it shall descend to the heir on the mother's side; so if it was *Borough English* or *Gavelkind*, it shall descend accordingly. III. 63
One dies indebted by bond, and seised in fee of divers lands, part of which he devises to *J. S.*, and other part he permits to descend to his heir; the lands descended shall in the first

place be liable to pay the bonds. III. 367

But had the testator devised the other part, though to his heir at law, (in which case the devise had been void as to the purpose of making the heir take by purchase) yet, as it would serve to shew the testator's intent that the heir should have this land; therefore the land devised to *J. S.*, and the other land devised to the heir, should, as it seems, contribute in proportion to pay the bond debts. *ibid.* (N)

Where lands in fee descend to an infant, the parol shall demur in equity as well as at law. III. 368

See also HEIR, PURCHASE.

Descendible Freehold.

See OCCUPANT.

DEVASTAVIT.

A term assigned by an executor in trust to attend the inheritance, shall in equity follow all the estates created out of it, and all incumbrances subsisting upon it: but the term being by these means become not assets at law, the executor who assigned the same is liable to the creditors as for a *devastavit*. III. 330

And see EXECUTOR.

DEVISE.

See WILL.

Devise, Executory.

A. seised in fee has two sons *B.* and *C.*, both unmarried, and devises his lands to trustees for five hundred years, in trust to pay 50*l. per ann.* to his eldest son *B.* for life, with power of distress, and on several other trusts, some of which are remote, remainder to the first and every other son of *B.* in tail, remainder to *C.*, the second son for life, remainder over; by the better opinion this is a good executory devise to the first son of *B.* II. 28

Devise of a term to *A.* for life, remainder to such children as the testator shall leave at his death, and if all the children die without leaving issue, then to *B.* The children die without leaving issue at the time of their death; this is a good devise over to *B.* III. 258, 304

See also *Limitation of Terms for Years* under title ESTATE.

Devise for Payment of Debts. See *Trust for raising Portions and Payment of Debts* under title TRUST.

DISMISSION.

Where the plaintiff proceeds both at law and in equity against the defendant for the same thing, and thereupon is ordered to make his election, if he chooses to proceed at law, or omits to elect within eight days after notice of the order, his bill is to be dismissed with costs. So likewise if he makes a special election to proceed at law as to part, and in equity as to other part, with regard to what the plaintiff in equity elects to proceed at law, his bill is to be dismissed with costs. III. 90 (N)

DISSENTERS, (PROTESTANT.)

Expressly and by name exempted by the toleration act (of 1 *W. & M.*) from the penalties of 35 *Eliz. cap.* 1. *sect.* 2. III. 39 (N)

Charity to dissenting ministers, good. III. 346.

DISTRESS.

For the encouraging of purchasers of fee-farm rents, the statute of 22 *Car.* 2. *c.* 6. gives the purchasers the same power of distress which the King had, (*viz.*) not only on the lands charged, but on any other of the lands belonging to the tenant. *Quære autem*, if such grantee of a fee-farm rent may distrain on lands of the tenant under other sequestration. I. 307

Lord brings a bill against tenant to recover a quit-rent, alleging that the land out of which the quit-rent issues, by reason of the unity of possession with other lands, is not known; the defendant answers as to discovery, and demurs as to relief; the demurrer allowed, in regard that on allowing

the same, the plaintiff was at liberty, in case he should think the defendant had not answered the whole bill, to except to any part; or might amend his bill, and distrain for the arrears of the quit-rent, so that he had a better remedy at law than this court could give him. III. 150

DISTRIBUTION.

Where an executor has an express legacy, the Court of Chancery looks upon him but as a trustee with regard to the surplus, and will decree the same to go according to the statute of distribution. I. 7

So though the next of kin has a legacy also. I. 544

Intestate dies leaving a deceased brother's child and a deceased brother's grandchild, the grandchild not admitted to any distributory share. The clause in the statute of 22 & 23 *Car.* 2. *cap.* 10., which says, that there shall be no representation among collaterals beyond brothers' and sisters' children, being to be intended that none shall take by representation but the children of brothers and sisters to the intestate. I. 25, 594

One dies intestate, leaving an aunt and a grandmother his next of kin; the aunt not entitled to come in for a distributory share with the grandmother. I. 41

On a son's dying intestate, and without wife or issue, the father is at this day entitled to the whole personal estate, though by the first of *Jac.* 2. the mother has but an equal share with the brother and sisters. I. 48, 49

How the law stood formerly with regard to distribution and inheritance. I. 50

Grandfather on the father's side, and grandmother on the mother's side, equally entitled by the statute of distribution. I. 53

As is also the half blood with the whole. *ibid.*

One covenants to leave his wife 500*l.* and dies intestate, upon which the wife's distributory share comes to above 500*l.*, this is a satisfaction of the covenant. I. 324

One devises the surplus of his personal estate to his relations; only such shall take as are capable of taking within the statute of distribution. I. 327

One dies intestate, leaving an uncle and a deceased aunt's son, the latter shall have no share under the statute of distribution. I. 594

One devises the surplus of his personal estate to four equally, and leaves *J. S.* executor in trust; and one of the four dies in the life of the testator; his share, as so much of the testator's estate undisposed of by the will, shall go according to the statute of distribution. I. 700

By the statute 1 *Jac.* 2. *cap.* 17. if after the death of the father, any of his children shall die intestate without wife or children, every brother and sister and their representatives shall have an equal share with the mother. The case was, that after the death of the father the son died leaving a wife and without children, but leaving a mother, brothers, and sisters, and two nieces, (the children of a deceased brother); resolved that this was within the statute; that the intestate's wife should have but one moiety, and that as to the other, the intestate's brothers and sisters, &c. should come in for an equal share thereof with the mother. II. 344

If the mother being a widow advances a child, and dies intestate leaving many children, the child advanced shall not bring what he received from his mother into hotchpot. II. 356

The statute of distribution grounded on the custom of *London*. II. 358

The intent of the statute of distribution was to make the provision for all the children equal, and do what a just and impartial father ought to do for them. II. 440

The statute of distribution made in favour of the practice of the spiritual court. II. 441

The right to the distributive share under the statute vests immediately on the intestate's death. II. 442

But not so as to exclude a posthumous child. II. 446

The statute of distribution affects only the personal estate undisposed of, in order to make the provision for each

child equal, but takes nothing away, which has been given to any child. II. 443

A. by will declares his intention to dispose of his household goods by his codicil, and devises the residue of his personal estate not disposed of, nor reserved to be disposed of by his codicil, to his wife. Afterwards the testator makes a codicil, and does not dispose of his household goods thereby; the household goods shall not go to the residuary legatee, but according to the statute of distribution. III. 40

Where an executor has an express legacy for his care and pains, though the next of kin has also an express legacy, yet the surplus shall go according to the statute of distribution; especially if the surplus was intended to be disposed of. III. 43

A Papist may take a personal estate by the statute of distribution, notwithstanding the 11 & 12 of *W.* 3. made to prevent the growth of Popery. III. 48

If one dies intestate without issue, brother or sister, but leaving several brothers' and sisters' children, *viz.* one nephew by a brother, and three nephews and two nieces by a sister; these shall all take *per capita*, and not *per stirpes*, because all equally of kin. *Secus*, had any one brother or sister been living at the death of the intestate. III. 50

Though the statute directs that no distribution shall be made within a year, yet if any one entitled to a share dies within a year after the intestate, the share of the deceased person will, notwithstanding, be an interest vested, transmissible to his representatives, in nature of a legacy, which, though given payable a year hence, would plainly be an interest vested presently; so that in this sense the statute may be said to have made a will for the intestate; and it is the same, where there is only one who can claim as next of kin, in which case there can, properly and strictly speaking, be no distribution. III. 49, 50 (N)

An estate *pur autre vie* is distributable in equity, though not in the spiritual court. III. 102

See also the statute of 14 Geo. 2.

A., having seven children, makes an executor in trust, and devises to each child one-seventh of his personal estate. One of the children dies in his lifetime, and one of the six surviving children has been advanced by the father in his lifetime; yet this child shall take his full share of the 7th part, without bringing what he had before received into hotchpot; for the bringing the advancement into hotchpot, is to be only in the case of a total intestacy, or where the whole personal estate is distributable, not where only part is so. III. 125

One devised his real estate to be sold for the payment of his debts, and the surplus, if any, to be deemed personal estate, and to go to his executors, to whom he gave 100*l.* a-piece; decreed the surplus to be distributed. III. 194 (N)

Where see Mr. Vernon's *report of this case rectified from the Register's book.*

DIVORCE.

In the case of a divorce *a mensa et thoro*, baron and feme live separately, and the wife has a child; this is a bastard, for the court will intend obedience has been paid to the sentence. III. 275

See also Baron and Feme.

DONATIO CAUSA MORTIS.

See Legacy.

DOWER.

Husband seised in fee mortgages for years, marries, and dies; his wife shall be endowed. I. 121

Legacy to a wife, in consideration that she releases her dower on a deficiency of assets, shall be preferred. I. 127

A trust term for years shall not, in equity, hinder dower. I. 137

A jointure made by a freeman of *London* on his wife in bar of dower will not extend to bar her of her customary part. I. 530

Where there was a mortgage in fee made

before marriage, the widow upon her paying the mortgage money, or keeping down a third of the interest, held by the Master of the Rolls, (Sir *Joseph Jekyll*,) entitled to dower of the equity of redemption. II. 700

Dower a moral right, and more favoured in law, having more privileges annexed to it than tenancy by the curtesy. II. 703, 704

A dowress shall have the benefit of a trust term against an heir or devisee, but not against a purchaser. II. 707

In case of a trust of an inheritance created by the husband himself, she shall not have dower; *secus*, where the trust is created by another person, or the husband's ancestor. II. 708, 709

A dowress shall be aided in equity against a trust term attendant on the inheritance. II. 714

The widow of a tenant in tail of a trust, to whom the legal estate is by the will of the donor directed to be conveyed at his age of twenty-one, and he living to that age, held entitled to dower. II. 715

Qu. If a Papist be not capable of taking as tenant in dower, (notwithstanding the 11 & 12 *W.* 3. made to prevent the growth of Popery) that estate being cast on her by act of law, and not by purchase. III. 49 (N)

A woman shall not be endowed of a trust, notwithstanding a man shall be tenant by the curtesy thereof. III. 229, 234

If a rent be granted in tail, without any remainder over, and tenant in tail takes a wife, and dies without issue; the wife shall not be endowed, because the thing out of which the dower is to arise is not in being; *secus*, if the rent were granted in tail, remainder over. III. 230

A mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's right of dower; the heir of the mortgagor, on his bringing a bill to redeem, allowed the benefit thereof. III. 252 (N)

Dower is incident to all estates tail, they being estates of inheritance. III. 263

Dower forfeitable on the elopement of the wife. III. 276

DOWRY MONEY.

Dowry money not to be claimed by the widow against debts. II. 79

DRUNKENNESS.

The having been in drink is not any reason to relieve a man against any bond, or deed, &c. gained from him when in those circumstances; for this were to encourage drunkenness; *secus*, if through the management or contrivance of him who gained the bond, &c. the party from whom it was gained were drawn in to drink. III. 130 (N)

DURHAM.

In the county palatine of *Durham*, writs are directed to the chancellor of *Durham*, ordering him to command the sheriff. III. 55

E.

EJECTMENT.

Mortgage in fee is made redeemable on payment of 300*l.* and interest upon any *Michaelmas* day, on six months' notice; the remedy in this case, on default of payment, is not by *mutuatus* at law, or by bill in equity, but by ejectment to recover the possession. I. 294

The same length of time which will bar an ejectment or entry, shall bar a right of redemption. III. 288 (N)

On the appointing a receiver in an adversary suit, as where the plaintiff in ejectment has recovered a verdict, the receiver's possession seems to be the possession of him who has the right. III. 379

ELECTION.

Where money is agreed to be laid out in land, the party who would be entitled to the sole interest in the land

when bought, may, (if not an infant) elect to have the money paid him, and that it shall not be invested in land. I. 130, 389, 470

A man has one daughter, to whom 8000*l.* is secured by marriage settlement, and afterwards he gives her 8000*l.* by his will for her portion, and 200*l.*, *per ann.* the daughter shall have but one 8000*l.*, though she may elect which of the portions she pleases. I. 147

Purchaser before a master may elect to lose his deposit; in which case he will not be bound to proceed in the purchase. I. 745

A. bound within four months after his marriage to settle lands of 100*l. per annum* on his wife, or else to leave her 2000*l.*, and dies within the four months, after which the four months pass; his executors shall elect either to pay the 100*l. per annum*, or the 2000*l.* II. 617

Where the plaintiff sues both at law and in equity for the same thing, he will be put to make his election in which court he will proceed, but need not however make such election, till the defendant has answered. III. 90

The nature of the order for making an election, together with a special election and the consequences thereof. *ibid.* (N)

Where the child of a freeman of *London* is put to his election whether he will abide by the freeman's will, or by the custom, he shall not be obliged to make such election till after the account taken. III. 124 (N)

A. dies indebted by one bond to *B.* and by another bond to *C.*, and leaves *B.* executor, who intermeddles with the goods, and dies before probate, and before any election made to retain; *Qu.* Whether as *B.* might have retained the goods in his hands, his executors have not the same power? III. 183

See also 184 (N)

Where the daughter of a freeman of *London* accepts of a legacy of 10,000*l.* left her by her father, who recommended it to her to release her right to her orphanage part, which she does release accordingly; if the orphanage part be much more than her legacy, though she was told she might elect which she pleased, yet if she did not know she had a right first to enquire into the value of the personal estate, and the *quantum* of the orphanage part, before she made her election; this is so material, that it may avoid her release. III. 316

If *A.* and *B.* are bound in a bond jointly and severally to *J. S.*, he may elect to sue them jointly or severally: but if he sues them jointly, he cannot sue them severally. So if *A.* and *B.* joint-traders become bankrupt, and there are joint and separate commissions taken out against them, and *A.* and *B.* before the bankruptcy become jointly and severally bound to *J. S.*, *J. S.* may elect under which commission he will come, but he shall not come under both. III. 405

ELEGIT.

See Writs.

ELOPEMENT.

Elopement with an adulterer no forfeiture of a jointure. III. 276

ENROLMENT.

See Inrolment.

ENTRY.

The same length of time shall bar a redemption in equity, as bars an entry at law. I. 270

Where lands were devised to *A.* for life, and if *A.* should die leaving issue male, then to such issue male and his heirs for ever: but if *A.* should leave no issue male, then to *B.* in fee; and *A.* suffered a common recovery of these lands, and five years passed; held that the right heirs of the testator were barred, in regard they ought to have entered upon such forfeiture, and had no new title of entry upon the death of the tenant for life. I. 520

The same length of time which will bar an entry, shall bar a right of redemption. III. 288 (N)
Where a disseisor makes a lease to a man and his heirs during the life of *J. S.*, and the lessee dies, living *J. S.*, this shall not take away the entry of the disseisee. III. 368 (N)

EQUITY.

One ought not to be condemned to pay costs in equity, for insisting on a right which the law gives him. III. 205
Where lands in fee descend to an infant, the parol shall demur in equity as well as at law. III. 368
See also COURT *of Chancery or Equity.*

ERROR.

Whether error lies on a rule or award of a *mandamus.* I. 348
Writ of error on a judgment on a *mandamus* no *supersedeas* to a peremptory *mandamus.* I. 351
Error lies not on a rule for a prohibition. I. 350
After judgment in an action on a policy of insurance, if error is brought to reverse such judgment for want of an original, the court will not permit the plaintiff to file an original. I. 412
In a foreclosure against an infant, though the infant has six months after he comes of age to shew cause, &c. yet he cannot ravel into the account, nor even redeem, but only shew an error in the decree. III. 352
If a decree be obtained and inrolled, so that the cause cannot be reheard, there is then no remedy but by bill of review, which must be on error appearing on the face of it, or on matter subsequent thereto. III. 371
And see *Writ of Error*, title WRITS.

ESCAPE.

A. lends money to *B.* and *C.* on bond, *B.* becoming a bankrupt, and his estate being assigned by the commissioners, *A.* sues *C.*, takes him in execution on a *ca' sa'*, and afterwards consents to his escape; yet *A.* shall come in as a creditor of the bankrupt for a moiety of his remaining debt. I. 237
One committed in equity, for a contempt for rescuing another taken on *Lord Chancellor's* warrant, such person not liable to an escape warrant. I. 439
Where one is taken in execution on an outlawry after judgment, debt will lie against the sheriff for the escape of such person, and need not be brought in the *tam quam.* I. 687
One convicted of felony within benefit of clergy, and sentenced to be transported for seven years, continues a felon till actual transportation and service for seven years, pursuant to the sentence; and if a stranger assist such felon convict, being in custody under sentence of transportation, to escape out of prison, the person assisting is accessary to the felony after the fact. III. 439

ESTATE.

Estate in Fee-simple.

A surrender of a copyhold to the use of baron and feme for their lives, *et hæredum et assignatorum*, of the said baron and feme; and for default of such issue, to the right heirs of *A.*, this is an estate in fee, and not an estate tail in the baron and feme; otherwise, had it been in the case of a will. By three judges of *B. R.* against *Gould*, J. I. 70
If lands are given to a bastard and his heirs, though such bastard can have no heir but of his body, yet it is a fee simple. I. 78
Devise of 50*l. per annum* to *A.* and his heirs, and if *A.* dies without heirs, then to a charity; this remainder void, the former estate being a fee-simple; and it will not be helped though *A.* die without issue, living the testator. II. 369
A. devises all his lands and estate in *D.* to *J. S.*, decreed a fee-simple passed, these words carrying not only the lands, but also the testator's interest therein. II. 523

In the pleading of a purchase or mortgage, the defendant must plead that the seller or mortgagor was, or pretended to be, seised in fee. III. 281

The words, "I devise all my temporal "estate," or "all the rest of my real "estate," pass an estate in fee-simple. III. 295

Estate in Fee qualified, or base Fee.

Tenant in tail of a rent granted *de novo*, without any remainder over, suffers a recovery; this will not pass an absolute, but only a determinable fee, *viz.* such as must end on the death of tenant in tail without issue. III. 230

Estate in Fee-tail.

A devise by a father to his second son and his heirs for ever, and for want of such heirs then to the right heirs of the testator, is an estate-tail; but had the devise over been to a stranger, the second son would have taken a fee-simple, and consequently the devise over had been void. I. 23

Devise to *A.* for life, remainder to his first, &c. son in tail male, and so on to his sixth son: and if *A.* should die without issue male of his body, then to *B.*, this held to give an estate-tail to *A.*, to the end that the seventh and other subsequent sons should not be excluded. I. 59, 754

So had the devise been to *A.* for life, and if *A.* died without issue then to *B.*, here the subsequent words would have turned the express estate for life into an estate tail. I. 605

Upon a settlement *A.* is made tenant for life, remainder to the heirs of his body by his wife *Jane*, and in the same deed covenants not to suffer a recovery, but that the lands shall be enjoyed according to the limitation; *A.* does suffer a recovery, and devises the lands; this covenant good to bind the assets; but *A.* being tenant in tail, and as such having a power to suffer a recovery, the lands devised shall not be affected. I. 104

One devises lands for payment of debts, and then to *A.* for life, with power to make leases, &c. remainder to the heirs male of the body of *A.*, though this be but the devise of a trust and executory, and expressed to be to *A.* for life, yet it is an estate-tail in *A.* barrable by a fine and recovery; *secus* in case of marriage articles to settle lands in that manner. I. 142, 290

Devise by tenant in tail to a charity, good, though no fine be levied, or recovery suffered previous thereto. I. 248

Cestui que trust in tail brings a bill against his trustees, to the intent they should join in a recovery; this not proper, but it is proper to pray that the trustees may convey the premises to *cestui que trust* in tail, who may then suffer a recovery; though if the trustees are also trustees for any annuities subsisting, they are not compellable to part with the legal estate out of them to the *cestui que trust* in tail. II. 134

A. devised 10,000*l.* to trustees, in trust to be laid out in lands and settled on *B.* for life, without waste, remainder to trustees and their heirs for the life of *B.* to support contingent remainders, with a power to *B.* to make a jointure, remainder to the heirs of the body of *B.*, remainders over; and by the same will devises lands to *B.* to the same uses and dies, leaving *C.* executor; *B.* sues *C.* the executor for the deeds relating to the lands that are in his hands, and to have the money laid out in lands and settled; decreed by the *Master of the Rolls* that *B.* had but an estate for life in the lands, and so not entitled to the deeds; but that they were to be brought into court, and that the lands to be bought with the money were to be settled on *B.* for his life only, remainder to his first, &c. son. But by the opinion of Lord Chancellor *King*, *B.* was held to have an estate tail in the lands devised, and consequently to be entitled to the deeds relating thereto; though as to the lands to be purchased, that being executory, and in the power of the court, *B.* was to be but tenant for life, with remainder to his first, &c. son. II. 471

Articles on marriage to settle lands on the husband and wife for their lives,

remainder to the first, &c. son of the marriage, remainder to the heirs male of the body of the husband by any wife, remainder to the heirs of the body of the husband by the first wife, remainder to the husband in fee, with provisions for the daughters of that marriage, if no son; husband has one daughter by the first wife, suffers a recovery, and marries a second wife, taking notice of his first marriage articles in his second settlement; he being tenant in tail by the articles was allowed by his recovery to have barred his daughter by the first marriage. II. 535

The next heir inheritable to an estate-tail entitled to the writ *De ventre inspiciendo.* II. 593

Money is articled to be invested in a purchase, and settled on *A.* in tail, remainder to him in fee. *A.* has neither wife nor issue, and by a fine only might dispose of the lands if settled; yet, (by the opinion of the Lord Chancellor *King*) the money ought not to be ordered to be paid to *A.* III. 13

Quære tamen, *and see the note subjoined.*

Devise to my son *A.* for life, remainder to his first son in tail male, remainder to his second, third, fourth, and fifth sons successively, without saying for what estate, or any words tantamount. *A.* has two sons, the former of whom dies in his lifetime; the second son shall have an estate-tail, being the first son at his father's death. *Qu.* III. 178

Tenant in tail of lands mortgaged is not bound to keep down the interest. And note, this was so resolved in the case where tenant in tail died during his infancy, and consequently before he had it in his power to suffer a recovery. III. 235

An estate *pur autre vie* may be limited in tail to *A.*, remainder to *B.* III. 262

All estates tail are estates of inheritance, to which dower is incident, and must be within the statute *De donis*, not liable to be forfeited, nor punishable for waste. III. 263, 265

A. tenant for life, remainder to *B.* in tail, there is timber on the premises greatly decaying. *B.* brings a bill praying the timber may be cut down; which is decreed on leaving sufficient for bootes, repairs, &c. and making satisfaction for the damage done to the tenant for life on the premises. III. 268

Estate for Life.

A. devised lands to trustees and their heirs in trust, that the profits should be equally divided between his wife and daughter during the wife's life; and after her death he devised the same to the use of the daughter in tail, remainder over, the daughter dies before the mother; this held to be a tenancy in common between the mother and daughter during the mother's life, and that on the daughter's death her moiety did not result to the heir, but was an interest undisposed of in nature of a tenancy *pur auter vie*, and belonged to the daughter's administratrix. I. 34

Devise to *A.* for life, remainder to his first and every other son in tail male successively, and for want of issue male of *A.* remainder over; this is only an estate for life in *A.*, even though the codicil took notice that the testator had given the premises to *A.* and the heirs male of his body. I. 54; *sed vide* 605

Devise to *A.* for life, and after his death to the heirs male of his body, and the heirs male of the body of such heir male severally and successively, as they shall be in priority of birth, &c. remainder over; *A.*, by the better opinion seems to be only tenant for life. I. 87

Devise to *Jane Styles* for life, and then to be at her disposal, provided she gives the premises to any of her children by her first husband; this gives her an estate for life, with a power to dispose of the fee. I. 149

Devise of land to a corporation, in trust to convey the premises to the testator's godson *A.* for life, and so to his first son for life, and afterwards to the first son of that first son for life, then to *B.* for life, with the like limita-

tions; this tending to a perpetuity will not be allowed, but the conveyance shall be made as near the intent of the party as the rules of the law will admit, *viz.* by making all the persons in being tenants for life; but the limitations to the sons unborn must be in tail. I. 332

One devises a third of all his estate whatsoever to his wife, and two thirds of all his real and personal estate to his son *J. S.* and his heirs: the wife has but an estate for life in the third part of the real estate, the word *estate* being intended to describe the *thing* only, and not the *interest* in the thing; and when the testator intends to pass a fee, he adds the word *heirs* to the word *estate*. II. 335

Tenant for life of lands mortgaged is obliged to keep down the interest. III. 235

A. tenant for life, remainder to *B.* in tail, of an estate whereon there is timber greatly decaying; the court will not allow the tenant for life to have any share of the money arising by sale of the timber, but will see that sufficient be left for repairs, bootes, &c. and that the tenant for life have satisfaction made him for whatever damage is done on the premises by him held for life. III. 268

A. tenant for years, remainder to *B.* for life, remainder to *C.* in fee, *A.* is doing waste; *B.* though he cannot bring waste, as not having the inheritance, yet he is entitled to an injunction. *ibid.* (N)

And see *Estate in Fee-tail, Estate for Years.*

Estate pur autre vie.

An estate for three lives granted to *A.*, his executors and administrators, is a personal estate; and will on *A.*'s death be liable to all his debts by simple contract, as a lease for years would be. II. 381

And see Occupant.

Estate for Years.

How and in what respects a devise of a term for years differs from a grant thereof. I. 575

One possessed of a term for years, devises all the profits thereof to *J. S.*, only the profits accruing from the death of the testator shall pass. I. 503

One devises his lands to his executors for and until payment of his debts; this is but a chattel interest in the executors. I. 509

A. devises a term for years to *B.* for life, remainder to *C.*; *C.* in the life of *B.* devises the remainder of this term; this is good, and amounts to *C.*'s declaring that his executors shall stand possessed of the term in trust for the devisee. I. 572

So if a devisee in remainder of a term articles for a valuable consideration to sell it; such devisee in remainder is afterwads but a trustee for the purchaser, but a voluntary assignment seems void. I. 576

Anciently there were rarely any leases for years but what were for a short time; for which reason they were esteemed to be of less continuance than an estate for life, and for the same reason such lessee could not falsify a feigned recovery. I. 574

If I devise all my real and personal estate, and afterwards purchase some lands in fee and some leases for years, the leases shall pass, but not the fee-simple lands. I. 575

Lessor covenanted to renew at the request of the lessee within the term; lessee did not request, but his executors do within the term; lessor is compellable to renew. II. 196

One seised of lands in fee in *A.*, and possessed of a term for years in *B.*, devises all his lands, tenements, and real estate in *A.* and *B.* to *J. S.*, this will not pass the term, especially if there be another clause in the will which disposes of the personal estate. III. 26.

One possessed of a term for years devises it to *A.* for life, remainder to the heirs of *A.*, it seems this shall, on *A.*'s death, go to his executor, and not to his heir. III. 29

Terms for years are expressly mentioned in the 11 & 12 W. 3. cap. 4. sect. 4. (made to prevent the growth of Po-

pery) so that a Papist is by that act disabled to take any leasehold as well as freehold estate by will. III. 46

But a Papist is not disabled to take leases for years (being personal estate) by the statute of distribution. III. 48, 49

An executor in trust for an infant of a lease for 99 years, determinable on three lives, on the lord's refusing to renew but for lives absolutely, complies with the lord, and changes the years into lives; on the infant's dying under 21, and intestate, this shall be a trust for his administrator, and not for his heir. III. 99

A lease renewed by a guardian for an infant's benefit, shall follow the nature of the original lease. III. 101

One possessed of a renewable term for years disposes of it by will, and afterwards renews it; the renewal no revocation of the will. III. 168

Secus, had it been the case of a lease for life. III. 170, 171

Where one has a term for years as executor, and afterwards purchases the inheritance, the term is not merged, and why. III. 329

See *Trusts for raising Portions and Payment of Debts*, under titles PORTIONS, TRUSTS.

Term attendant on the Inheritance.

A. seised in fee demises to *B.*, his executors, &c. for 99 years, in trust for himself and his wife for their lives, and the life of the survivor; and after the death of the survivor, in trust for the heirs of their two bodies; and in default of such issue, for the heirs of the body of the husband, remainder to the heirs of the survivor of the husband and wife; husband and wife have issue a son, the husband dies, after which the son dies without issue in the life of the mother, who, administering to her husband and son, assigns this term to the defendant; decreed the assignee well entitled, and that the term should not go to the heir of the husband, as attendant on the reversion. I. 360

A. possessed of a term for 500 years in *Black-acre*, afterwards purchases the fee-simple in *B.*'s name, and devises *Black-acre* to *J. S.* in fee, but the will is not attested by three witnesses; the term shall not pass, because attendant on and part of the inheritance. II. 236

A term assigned by an executor in trust to attend the inheritance, shall in equity follow all the estates created out of it, and all incumbrances subsisting upon it. III. 330

Limitations of Terms for Years, Money, &c.

A. devises household goods to his wife for life, and afterwards to his son; the court held this a good devise over, and to be the same as if it had been only of the use of the goods to the wife for life. I. 1

Trust of a term is limited to *A.* for life, then to his first, &c. son in tail male, and for want of issue male, to his daughter or daughters for the remainder of the term; there having never been a son, the limitation to the daughter was held good. I. 98

A. on his marriage assigns a term of 1000 years in trust for himself for life, remainder to his wife for life, remainder to the heirs of the body of the husband and wife, &c. the wife dies leaving issue; the whole term vests in the husband, and he may assign it. I. 132

A legacy given upon a man's dying without issue, to be paid within six months after, the man dies leaving issue, which issue within six months after dies without issue; the legacy not due, it not being intended to arise upon any remoter contingency than that of the man's dying without issue living at his death. I. 198

Termor devises his term to *A.* for life, remainder to such of his issue as *A.* should appoint, and if *A.* die without issue, remainder to *B.*, this is held a good devise to *B.*, being to be understood if *A.* die without issue living at his death. I. 432

One having two nephews, *A.* and *B.*, devises personal estate to *A.* and *B.*, and if either of them die without children, then to the survivor; this

is good, being to be intended without children living at his death. I. 534

One devises his personal estate to his son, and if his son die within age, and without issue, then to go to the testator's brother; the son shall have the produce of the personal estate, and only the capital, in case of the infant's death, &c. shall go to the brother. I. 500

One possessed of a personal estate, devises that if his wife die without issue by him, then 80*l.* shall be paid to his brother; this good, even though the brother dies in the life of the wife. I. 563

Devise of a trust of money on failure of issue generally, or a bond or covenant to pay money on such failure, good; *secus* of a limitation of a term. I. 566, 750

One possessed of a term for years devises it to *A.* and *B.*, and if either of them die and leave no heir of their respective bodies then to *C.*, this held a good limitation to *C.* if *A.* or *B.* left no issue at their death. I. 664

A devise of a term for years to one for a day, or an hour, is a devise of the whole term, if the limitation over is void, and it appears at the same time that the whole is intended to be disposed of from the executor. I. 665, 666

Devise of 400*l.* to *A.*, and if he die without issue, then to *B.*, this is good, and to be intended if *A.* die without issue living at his death. I. 748

Devise of a personal estate to *A.* for life, and afterwards for her children; the yearly interest and produce to be for their maintenance until the sons should be twenty-one, and the daughters eighteen, at which respective ages their respective portions to be paid to them, and for want of such issue then to *B.* *A.* dies without issue; the devise over to *B.* good, the words [for want of such issue] being the same as [for want of such children.] II. 421

A jointress demises her estate for life for ninety-nine years, if she so long live, in trust for herself during her widowhood, and after her marriage in trust for one of her younger sons, and the heirs of his body, and if he died without issue, remainder in trust for her next younger son; the eldest son dies without issue and intestate; whether the trust of this term shall go to his administrator or to the next son in remainder. II. 676

One possessed of a term devises it to *A.* for life, remainder to his first, &c. son in tail successively, remainder to his daughter, and if *A.* shall have neither son nor daughter, then to *J. S.* *A.* dies, never having had a son or daughter, the devise over to *J. S.* is good. II. 686

The common course of settling terms for years. II. 690

One gives a legacy of 200*l.* a-piece to his children, payable at twenty-one; and if any of them die before twenty-one, then the legacy given to him so dying to go over to the surviving children. One of the children dies in the life of the testator; though this legacy lapses as to the legatee dying under twenty-one, yet it is well given over to the surviving children. III. 113

Devise of a term to *A.* for life, remainder to such children as the testator shall leave at his death, and if all the children die without leaving issue, then to *B.* The children die without leaving any issue living at the time of their death; this a good devise over to *B.* III. 258

Where the words used in a devise of a leasehold would make an express estate-tail were it in the case of a freehold, there a devise over of such leasehold is void; *secus*, if the words in the former devise would, in the case of a freehold, make an estate-tail only by implication. III. 259

One devises a term of years to *A.* and if *A.* dies without a child, then to *B.*, this is a good devise to *B.* upon such contingency; and the court will aid the devisee over, by directing an account and discovery of the estate, in order to secure it in case the contingency should happen. III. 300, 304

See also Devise, Legacy.

Estate at Will.

If a father buys a gentleman pensioner's place, or a commission in the army, for his son, it is an advancement *pro tanto*, though but an office at will. III. 317 (N)

Estate in Contingency. See CONTINGENT INTEREST; TRUSTEES *for preserving Contingent Remainders.*

Estate by Copy of Court Roll. See COPYHOLD.

Estate by the Curtesy. See CURTESY.

Estate in Dower. See DOWER.

Estate in Jointenancy. See JOINTENANTS.

Estate in Remainder. See REMAINDER.

Estate in Reversion. See REVERSION.

Estate by Implication. See IMPLICATION.

ESTOPPEL.

Lands are devised to *A.* and *B.* and the heirs of the survivor, in trust to sell; though the inheritance be in abeyance, yet the trustees, by a fine, may make a good title by estoppel. III. 372

EVIDENCE AND PAROL EVIDENCE.

Parol proof, provided it be plain and indisputable, admitted in case of a will of a personal estate, especially where it is only to rebut an equity arising by implication. I. 9, 116

Parol evidence, when concurring with the conveyance, and only to rebut a pretended resulting trust, admitted to shew the intention of the party. I. 113

Under some circumstances the plaintiff himself has been allowed a good witness; as where a witness at the time of his examination was disinterested, but afterwards became interested and plaintiff in the cause, his depositions were, notwithstanding, allowed to be read. I. 288

So, where the surviving witness to a bond was made executor to the obligee; in an action brought by him on the bond, evidence was admitted to prove the plaintiff's hand. I. 289

In what special cases the answer of one defendant may be read against another. I. 300

A. a freeman of *London* purchases an estate in the name of *B.*, but no trust is declared, *A.* dies, and *B.* gives a declaration in trust; this is good. I. 321

A witness dies after having been examined, but before such examination is signed by him; the depositions no evidence. I. 414

But yet where the defendant after publication examined a witness, and on the usual affidavit, that the defendant, his clerk or solicitor, had not seen the depositions, got an order to re-examine this witness, but the witness died before a re-examination, the court gave leave to the defendant to make use of the former depositions of the same witness. I. 415

In a will of land, one of the three witnesses is devisee of part of the land devised thereby; *quære*, whether not a good witness if he has aliened the land without covenant or warranty. I. 557

One seized in fee, as heir of his mother's mother, devises the land in trust to pay several annuities, and the residue to go to the right heirs of his mother's side for ever: parol evidence admitted to prove which heir was intended, *viz.* whether the heir of the mother's mother's side, or the heir of the mother's father's side. II. 136

One makes a will, and an executor, giving a legacy of 500*l.* to the executor, but making no disposition of the surplus; parol evidence of the intention and declaration of the testator touching the surplus admitted. II. 210

A witness examined on a commission swears reflecting words; yet he ought not to pay costs, it being the com-

missioners' fault to take down such deposition. II. 406

A witness examined at a former trial of an issue between the same parties, and who had been examined in the cause, dies; not only his depositions may be read, but what he swore at the former trial may be given in evidence. II. 563

A breach of trust evidence of the greatest fraud. III. 131

An infant's answer cannot be given in evidence against him, because it is not the infant's answer, but the guardian's who only is sworn to it, and not the infant. III. 237

The answer of a feme covert no evidence against her husband. *Qu.* If it may be read against herself when discovert. III. 238

A bond or mortgage is, *prima facie*, good evidence of a debt; but in case fraud appears, the obligee, &c. ought to prove actual payment of the money. III. 289

Where a bond is given, and no interest appears to have been paid for 20 years thereon, it is presumptive evidence that the bond has been satisfied, unless something appears to answer that length of time. III. 396, 397

Where see in the note what evidence has been thought sufficient to take off such presumption of payment.

In the case of a special verdict, the judges are to determine the law upon the fact as found positively by the jury, and not upon the evidence of the fact. III. 493

In an indictment against one as accessary, after the fact to a felony, by receiving, &c. an outlawry or attainder, in a particular county, may, as the case may happen to be circumstanced, be some evidence to a jury of notice to an accessary in the same county; but cannot, with any reason or justice, create an absolute legal presumption of notice. III. 496

No parol evidence ought to be admitted in the case of a devise of a guardianship, any more than in the case of a devise of land. III. 51

Parol evidence not to be admitted touching the testator's intention, and why. III. 354

See also ANSWER, WITNESS.

EXAMINATION.

The reason of examining a witness *de bene esse*, and whether a prosecution for perjury will lie on such deposition. I. 568

After publication, and examinations known, the court will not give either side leave to examine. I. 727

A commission being granted to examine witnesses at *Algiers*, the plaintiff died, by which, in strictness, the suit abated, but the witnesses were examined there before notice of the plaintiff's death; the examination held regular, though one of the witnesses was living. III. 195

The defendant being a weak man, and to be examined on interrogatories; the master himself ordered to take such defendant's examination, lest he should unwarily admit something against himself that was not true. III. 289

See also DEPOSITIONS, EVIDENCE, WITNESS.

In perpetuam rei memoriam.

A witness was ordered to be examined *de bene esse*, where the thing examined into lay only in the knowledge of the witness, and was a matter of great importance, though the witness was not proved to be old or infirm. III. 77

After Publication.

After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses in order to falsify the defendant's examination; this tending to multiply causes, and to make them endless. III. 413

EXCEPTIONS.

To an Answer.

The defendant pleads to the whole bill; and on arguing the plea, it was or-

dered to stand for an answer, without saying one way or other whether the plaintiff might except; this must be intended a sufficient answer, and the plaintiff cannot except. III. 239

If a demurrer be to part of the bill, and an insufficient answer to the residue; yet the plaintiff cannot except until the demurrer is argued. III. 326

But if to a bill the defendant answers as to matter of discovery, and pleads only as to relief, the plaintiff may except to any matter of discovery before the plea argued; for that plainly no matter of discovery is covered by the plea. III. 327 (N)

To a Master's Report.

On an answer's being reported not scandalous or impertinent, if the plaintiff except to the master's report, he must shew specially wherein it is scandalous or impertinent. II. 181

Quære, Whether this rule does not hold stronger where exceptions are taken to an answer for insufficiency, and the master reports it sufficient, that the plaintiff in his exception should shew wherein the answer is insufficient. *ibid.*

Where a bill or answer is referred for scandal, and reported to be scandalous; if the master has once expunged this scandal, the party cannot except, as it will not appear on record what that scandal was, and it was the party's own fault that he did not except to the report sooner. II. 182

EXCISE.

A., by his interest with the commissioners of excise, gets an office in that branch of the revenue for *B.*, who in consideration thereof gives a bond to *A.* to pay him 10*l. per ann.* as long as *B.* enjoys the place; equity will relieve against such bond. III. 391

Though the excise was no part of the revenue at the time of making the statute of 5 and 6 *Ed.* 6., yet there may be good ground to construe it within the reason and mischief of that statute. III. 393

EXCOMMUNICATION.

Want of addition in the libel on which there is an excommunication, where the proceedings are not by way of proclamation with pains and penalties, no objection. I. 435

It must be shewn where the defendant was commorant, but sufficient if this be set forth in the libel; also the *Lord Chancellor* inclined to think, that after the writ has been issued out of Chancery, brought into *B. R.*, and there delivered to the sheriff, but not yet actually returned into *B. R.*, this court, on a plain error appearing, may supersede or quash it. I. 436

EXCOMMUNICATO CAPIENDO.

See Writs.

EXECUTION.

A creditor, by statute, of *J. S.*, if *J. S.* become a bankrupt, and the statute be not sued and executed before the bankruptcy, shall come in only *pro rata*, though there were lands in fee bound by the statute. I. 92

Suing out an execution against the bail, pending a writ of error in parliament, is a contempt and breach of privilege. I. 685

The plaintiff gets judgment in the petty bag, after which he is stopped by an injunction. The year and day pass; the plaintiff, though hindered by the injunction, cannot yet sue out execution without a *scire facias*. III. 36

Qu. If in such case he could not have taken out execution, and have continued by *vice-comes non misit breve?* *ibid.* (N)

A. died seised of some lands in fee, and considerably indebted by judgment and simple contract. After the death of *A.*, and before the essoin day of the next following term, many of the judgment creditors delivered *fieri facias's* to the sheriff, and took the goods and furniture of *A.* in execution. In this case it was held, that the judgment creditors having lodged their writs of execution with the sheriff in the same vacation that the party died, it related to the teste of the writ as to all but purchasers; and, consequently, that the goods by relation were evicted in *A.*'s life-time; and therefore the simple contract

creditors could not as they petitioned, be admitted to stand in the place of the judgment creditors on the land, and be paid thereout in proportion as the others had exhausted the personal estate. III. 399, 400 (N)

See also INJUNCTION.

EXECUTION OF A POWER.

See POWER: also DEEDS, *and the Construction and Operation of them.*

EXECUTOR AND ADMINISTRATOR.

Where a legacy is given to a man, his executors, administrators, and assigns, if the legatee dies in the life of the testator, his executors, &c. shall not have the legacy. I. 84

If two executors join in a receipt for money, and only one of them actually receives it, both are chargeable to creditors, but not to legatees. I. 241

An executor in equity, as well as at law, may prefer any creditor in equal degree, or after an action brought by one creditor may confess judgment to another. I. 295

An executor cannot bring a bill without shewing thereby that he has proved the will: but it is sufficient to shew that he has duly proved the will, without specifying in what court. I. 752, 766

So if an executor brings a *scire facias* to revive a decree, he must shew he has proved the will; and if there be *bona notabilia* in divers dioceses, if he shew proof of the will in the spiritual court of one of the ordinaries, this is not good, but in such case the proof must be in the archbishop's court. I. 766

Where there were several executors, some admitted assets; yet an account was decreed against the rest. II. 145

One possessed of a term devises it to *A.*, makes *B.* his executor, and dies leaving some debts; if the executor sells the term, the purchaser shall hold it against the devisee; *secus*, if sold at an under-value, or if the purchaser knew that there were no debts, or that the debts were or might be paid without breaking in upon this specific legacy. II. 148

One by will gives an annuity out of his personal estate; if the executor has misbehaved himself, the court will order part of the personal estate to be set aside to secure this annuity. II. 163

An executor pays beyond assets, he cannot make the legatees refund. II. 296

An executor or administrator may retain out of assets as well for a debt due in trust for himself, as for a debt due to himself. *Quære tamen.* II. 298

One devises that his executors shall sell his land, and leaves two executors, one whereof dies, the other renounces, and administration is granted to *A.*, who brings a bill against the heir to compel a sale; whether the renouncing executor, in whom this power of sale collateral to the executorship was vested, ought not to be made a party? II. 308

One devises, that his executors shall sell his lands and invest the money in purchasing an annuity for *J. S.* to whom he gives the residue of his personal estate; the testator dies, and the annuitant dies three months after the testator; yet the administrator of the annuitant shall compel a sale, and shall have the money arising therefrom, and also the rents and profits till sale. II. 309

If an executor pays one legacy, upon a supposition that there are assets to pay all the other legacies, and afterwards there is a deficiency, the legatee must refund. II. 447

An administrator *pendente lite* touching a will may maintain actions for recovering debts due to the deceased. II. 576

If there be a decree for an account, to which the executor is party, and the executor has a debt which he does not claim, and lies by, and the account is taken and perfected; he shall not bring a new bill for his debt, and put the estate to a fresh charge, this being contrary to the trust reposed in him. II. 733

One possessed of a term for years, de-

vises it to *A.* for life, remainder to the heirs of *A.*, it seems this shall, on *A.'s* death, go to his executor, and not to his heir. III. 29

A woman having a bastard, leaves a personal estate to her executor in trust for the bastard, who dies intestate, without wife or issue. The executor brings a bill against one who has part of this personal estate in his hands; the defendant demurs, because the attorney-general and the administrator are not parties; the demurrer disallowed, for that the executor has the legal title, and consequently may sue for the estate. III. 33

In the like case, it seems, that an executor, though a bare trustee, and though there be a residuary legatee, may sue for the personal estate in equity as well as law, unless the *cestui que trust* will oppose it. III. 34

Where an executor has an express legacy for his care and pains, though the next of kin has also an express legacy, yet the surplus shall be distributed, especially if such surplus was intended to be disposed of. III. 43

Where an infant executrix under seventeen marries an husband of full age, this does not determine the administration. III. 88

An executor in trust is not a good witness for his *cestui que trust*, as he is liable to be sued by creditors, and to answer costs. III. 181

A., dies indebted by one bond to *B.* and by another bond to *C.*, and leaves *B.* executor, who intermeddles with the goods, and dies before probate. *Qu.* As *B.* might have retained the goods in his hands, his executors have not the same power? III. 183

Any voluntary bond is good against an executor, but to be postponed to a simple contract debt. III. 222

The court never allows an executor for his time and trouble, especially where there is an express legacy for his pains, &c. neither will it alter the case, that the executor renounces, and yet is assisting to the executorship; nor even though it appears that the executor has deserved more, and benefited the trust, to the prejudice of his own affairs. III. 249

Where there are two executors, and one renounces, he is still at liberty to accept of the executorship; *secus*, where both renounce. III. 251

Though in this matter the common lawyers differ from the civilians, the latter holding that a renunciation once made, though only by one of them, is peremptory. *ibid.* (N)

An executor in trust who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused, but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship, and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust money in their hands; but the demand was disallowed. III. 251, 252 (N)

An executor, administrator, or trustee, buys in or compounds debts, &c. it shall enure to the benefit of the testator, &c. III. 252 (N)

At common law, and before the statute of frauds, &c. if a man granted a rent to *A.* his executors and assigns, during the life of *B.*, and afterwards the grantee had died leaving an executor but no assignee; the executor should not have had the rent, in regard it being a freehold, the same could not descend to an executor. But now since the statute of frauds, &c. if a rent be granted to *A.* for the life of *B.*, and *A.* die, living *B.*, *A.*'s executors, &c. shall have it during the life of *B.* III. 264 (N)

If there be two executors, who are also residuary legatees, and one of them for a valuable consideration assigns part of his *residuum* to *A.*, and afterwards for a valuable consideration assigns his whole *residuum* to the other executor; if both are but *choses en action*, the first assignment must take place. III. 308

An executor, administrator, or trustee for an infant, neglects to sue within six years: the statute of limitations shall bind the infant. III. 309

A term assigned by an executor in trust to attend the inheritance, shall, in equity, follow all the estates created out of it, and all incumbrances subsisting upon it; but the term being by this means become not assets at law, the executor who assigned it, is liable to the creditors, as for a *devastavit*. III. 330

A. covenants for himself and his heirs, that a jointure-house shall remain to the uses in the settlement: the jointress cannot bring a bill against the heir for a performance, without making the executor a party. III. 331

Though in a bill brought by a mortgagee against the heir to foreclose, the executor of the mortgagor need not be a party, and why. III. 333 (N)

Where the will does not require that the executor shall give security, it is not usual for the court to insist on it, until some misbehaviour: but where one by will charged the residue of his personal estate with 40*l. per ann.* to his wife to be paid quarterly, the executor was ordered to bring before the Master sufficient in bonds and securities to answer this annuity. III. 336

The spiritual court has no power to require security of an executor for a due administration of the assets. III. 337 (N)

Where an executor before probate files a bill, and afterwards proves the will; such subsequent probate makes the bill a good one. III. 351

A *chose en action* (as a bond) cannot pass by delivery in nature of a *donatio causâ mortis*, in regard it must be sued in the name of the executor. III. 358

Though, generally speaking, an executor or trustee compounding or releasing a debt must answer for the same; yet, if it appears to be for the benefit of the testator's estate, it is an excuse. III. 381

Where an executrix of *A.*, who was greatly indebted to divers persons in debts of different natures, being sued in Chancery by some of them, appeared and answered immediately, admitting their demands, (some of the plaintiffs being her own daughters) and others of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the Court of Chancery being for a just debt, and having a real priority in point of time, was preferred in the order of payment, and the executrix protected and indemnified in obeying such decree. III. 402 (N)

In what Cases an Executor shall or shall not be only a Trustee.

Where an executor has an express legacy, the Court of Chancery looks upon him as a trustee with regard to the undisposed surplus; and will make him account for it to the next of kin, although the spiritual court has no such power. I. 7

Though in all such cases parol proof may be admitted to shew that the testator intended to give his surplus to his executors, this being only to rebut an equity arising by implication in favour of the next of kin. I. 9, 115

Where, on a bill brought by the next of kin for a distribution, the executor in his answer waived the benefit of the surplus, by mistake of the law in that point, he being able to prove the testator's intentions to give him the surplus, yet he was denied to amend his answer. I. 297

One devised lands to his executors (who were no relations to him) and the survivor of them, to sell for the best price, and to pay his debts, legacies, and funeral, so far as the same would extend, giving legacies to his heirs at law, and 100*l.* to the children of one of the executors, but nothing to the executors themselves; in such case the executors were looked upon as trustees for the heir at law after debts paid. I. 390

An executor has an express legacy, and so have the next of kin, but no disposition of the surplus; the latter decreed to have it. I. 544

In which case see also several instances where an executor, though a wife, has been decreed to distribute.

If I make *A.* my executor, and say no more, and *A.* dies intestate, without disposing in his lifetime of such personal estate, my next of kin, and not his, shall have administration *de bonis non*, together with all my personal estate; *secus*, where I make *A.* my executor, and give him all my personal estate. I. 553

One by will gives his executor 5*l.* for his care in performing the will, and makes no disposition of the surplus: but parol proof made of the intention and direction of the testator to the scrivener that the executor shall have the surplus; yet the surplus decreed to the next of kin. II. 158

One makes a will, and an executor, giving a legacy of 500*l.* to the executor, but making no disposition of the surplus; parol evidence of the intention and declaration of the testator touching the surplus admitted. II. 210

Generally speaking, if there be an express legacy to the executor, and no devise of the surplus, the executor shall not have the surplus, but the same shall be distributable according to the statute. II. 211

The testatrix saying, that she hoped her executor would not take it ill that she gave so much from him, an evidence that the surplus was intended for the executor. II. 214

Where the wife has been executrix, and at the same time has had an express legacy, she has nevertheless under some circumstances been held entitled to the surplus; *a fortiori* where the executor bears the title or honour of the family. II. 215, 216

In case of a will, where an express legacy is given to the executor, if a legacy be also given to the next of kin, this is equally a bar to the next of kin as to the executor; and therefore if the surplus be not disposed of by the will, the executor shall have it. *Quære tamen.* II. 338

See also Legacy, Trust.

How to account.

Two executors join in a receipt for money which is actually received by one of them only, both liable to creditors, but not to legatees: but where two trustees join in a receipt, the money being paid to one, only the receiving trustee shall be charged. I. 83, 241

Where an executor puts out money without the indemnity of a decree, upon a real security, which at that time there was no reason to object to, but afterwards such security proves bad; he is not accountable for the loss, any more than he would have been entitled to the profit, had it continued good. I. 141

An executor pays the assets of his testator into the hands of a banker his co-executor, whom the testator used to intrust with his money, after which the banker failed; the executor not chargeable with this loss. I. 243

A mortgage comes to an executor, who receives the money and pays it away to his testator's creditors, afterwards it appears that the mortgage has been satisfied in the testator's lifetime; the executor must refund, though he had before paid the money away in debts which he had not otherwise assets to pay. I. 355

So if an executor recovers a debt, and pays the testator's debts with it, after which the judgment recovered by him is reversed in error; he must restore the money to the plaintiff in error, and his having paid it away in debts will not excuse him. I. 357

In what Priority Debts are to be paid by an Executor or Administrator, see further under title Assets, Debts.

See under title Heir, *Matters controverted between Heir and Executor.*

EXECUTORY DEVISE.

See *Devise, Executory.*

EXPOSITION OF WORDS.

Articles construed against the words for the sake of the intent; as where the wife's portion was to be laid out in land to be settled on husband and wife and the heirs of their bodies,

and if not laid out in land during their joint lives, and the wife should die first, that the money should go to her brother and sister; the wife dies first, leaving issue, and the money is not laid out in a purchase; yet the issue, and not the wife's brother and sister, shall have it, equity supplying the words, *if the wife die without issue.* I. 234

Where there is a power to charge lands with younger children's portions living at the father's death, a posthumous child is within the power. I. 245

By the devise of all one's goods a bond will pass. I. 267

One being on ship-board and entitled to part of a considerable leasehold estate by the death of his mother, which he did not know of, makes his will at sea, devising to his mother (if living) his rings, and makes *A.* his executor, to whom he devises his red box, *and all things not before bequeathed;* these general words shall not pass what the testator did not know he had a right to, but shall be restrained to things *ejusdem generis.* I. 302

One devises the surplus of his personal estate to his relations; only such shall take as would be entitled within the statute of distribution. I. 327

A devise to one's poor relations, how construed. *ibid.*

Sed quære.

If one devises the surplus of his estate to his children and grandchildren living at his death, a grandchild *en ventre sa mere* at the testator's death shall take; *secus*, had the devise been to his children and grandchildren. I. 342

A bequest of household goods extends to all household goods purchased after the making of the will, and that are in the house at the testator's death, as also to plate in common use in a family. I. 424, 575, 598

Where a will was wrote blindly and hardly legible, and the legacies in figures, the court referred it to a master to examine what those legacies were, and the master to be assisted by such as understood the art of writing; also where the legatee's name was very falsely spelt, referred to a master to see who was intended. I. 425

A provision for daughters *to be* born extended to daughters *then* born. I. 426

One by will gives 5*l. per annum* to all and every the hospitals, and it was proved the testator lived in a place where there were hospitals; it was taken to be those hospitals, and not to extend to another hospital about a mile from thence, though founded by the same person. *ibid.*

Hospitals and spittals the same. *ibid.*

A devise was of a trust to all the testator's daughters *or* their children living at the testator's son's death; some of the daughters were living at the son's death, and had children, and other of the daughters were dead, leaving children, decreed that all the children as well of the living as of the dead daughters, should take, the word *or* being to be taken for *and.* I. 434

A. devises his library of books *now* in the custody of *B.*, and afterwards buys more books, which he places in the same library; the after bought books shall pass. I. 597

By a devise of a house *cum pertinentiis*, only the garden and orchard will pass with it: but by the devise of a house with the lands appertaining thereto, the lands occupied therewith shall pass. I. 603

Two schools in one town, one a free, the other a charity school for boys and girls; *A.* devises 500*l.* to the charity school; though both be charity schools, yet only that for boys and girls shall take. I. 674

See CHARITY.

One makes his will and says, *as to such estate as God hath blessed me with I devise in manner following:* after which he gives part to *J. S.* and his heirs, and devises the rest of his estate to his wife in fee; this passes a trust-estate. II. 198

One has a house in which he lives, and household goods, he has also a house at *Gosport* near *Portsmouth*, for invalid seamen, with a vast number of

beds, sheets, and household stuff; and by marriage articles it was agreed that his wife should have no claim on his personal estate, *except his household goods, and household stuff;* this exception to extend only to the goods which he had in the house in which he lived, and not to such as were in the hospital made use of by the government. II. 302

One devises a third of all his estate whatsoever to his wife, and two-thirds of all his real and personal estate to his son *J. S.*, and his heirs; the wife has but an estate for life in the third part of the real estate, the word *estate* being intended to describe the *thing* only, and not the interest in the thing; and when the testator intends to pass a fee, he adds the word *heirs* to the word *estate.* II. 335

Where the words *heirs of the bodies of the husband and wife, and their heirs*, shall be construed *children.* II. 342

One bequeaths to her grandchild *A.* some of her best linen; this void for uncertainty; yet the court recommended it to the executor to give some of the best linen to the legatee. II. 387

A bequest of such of the best linen as the executor should think fit, or as the legatee should choose, had been good. II. 388

Plate in common use held to pass by the devise of household goods, notwithstanding any parol proof that it was not intended to pass. II. 420

One seised in fee, and possessed by lease for twenty-one years of lands in *D.*, devises all his lands whereof he is seised, possessed, or any ways interested in, to *A.* for life, remainder to *B.* in tail, remainder to *C.* for life, with power to make a jointure, remainder to trustees to preserve contingent remainders, &c. decreed the leasehold should pass as well as the freehold. II. 456

A. devises all his land and *estate* in *D.* to *J. S.*, decreed a fee passed, these words carrying not only the land, but also the testator's interest therein. II. 523

One seised of lands in fee in *A.* and possessed of a term for years in *B.* devises all his lands, tenements, and real estate in *A.* and *B.* to *J. S.* and his heirs; this will not pass the term, especially if there be another clause in the will which disposes of the personal estate. III. 26

A. has two sons *B.* and *C.*, and on the marriage of *B. A.* settles part of his lands on *B.* in tail; and *A.* being seised in fee of the reversion of these lands, and of other lands in possession, devises all his lands and hereditaments, *not otherwise by him settled or disposed of;* the reversion in fee shall pass. III. 56

One devises all his lands in *A.*, *B.*, and *C.*, and *elsewhere.* The testator has lands in *A.*, *B.*, and *C.*, and lands of much greater value in another county; the lands in the other county shall pass by the word *elsewhere.* III. 61

A will began, "As to all my worldly "estate, my debts being first paid, "I give, &c." the real estate held liable to the debts, nothing being devised till the debts should be paid. III. 91, 359

Devise of all of one's household goods and other goods, plate, &c. to *A.*, the residue of my personal estate to *B.*, the ready money and bonds do not pass by the word *goods*, for then the bequest of the residue would be void. III. 112

Devise to such of the children of *A.* as shall be living at his death. *A.* has issue *B.* who becoming bankrupt, gets his certificate allowed, after which *A.* dies; this contingent interest in the bankrupt is assignable by the commissioners, the words of the 13 *Eliz.* empowering them to assign over all that the bankrupt [himself] *might depart withal*, and here the bankrupt might have released this contingent interest. Besides, the later statutes concerning bankrupts mention the word *possibility.* III. 133

How in an injunction the words *licebit autem* (for the defendant in equity) *placitum ad communem legem postulare, et ad triationem inde procedere, et pro defectu placiti judicium*

intrare, are to be understood. III. 146

See also the note subjoined.

One by will devises that all his debts and legacies shall be paid out of his personal estate, and if that not sufficient, then that his executor within twelve months after his death shall sell or mortgage so much of his real estate as shall suffice for that purpose, and *(inter al')* gives a legacy of 1000*l.* to *J. S.*, who dies within a year, and the personal estate is not sufficient; this is a vested legacy, and shall be paid to the executor of *J. S.* the legatee, though charged upon land; for the words *within twelve months* denote the ultimate time, but the executor may pay it sooner. III. 172

Devise to *A.* until *B.* shall attain forty years; *B.* dies before forty; *A.*'s estate ceases. *Secus*, if the devise to *A.* be made a fund to pay debts or portions, which cannot be raised until *B.* shall have attained his age of forty; in which case the word *shall* is taken for *should*. III. 176

Devise to my son *A.* for life, remainder to his first son in tail male, remainder to his second, third, fourth, and fifth son successively, without saying for what estate, or any words tantamount; *A.* has two sons, the former of whom dies in his lifetime; the second son shall have an estate-tail, *being the first son at his father's death*. III. 178

One makes his wife his *sole heiress and executrix of all his real and personal estate, to sell and dispose thereof at her pleasure to pay his debts and legacies*, and gives his brother (who was his next of kin and heir) 5*l.*, the wife has the residue to her own use, and not as a trustee. III. 193

Money articled to be laid out in land, and settled on the husband and wife and issue, remainder to the husband in fee, will, in case there is no issue, pass by the husband's devise of his real estate, though the money was never laid out: but this must be understood, provided it be the intention of the party that it should pass as such; for if it appears to have been his intention to pass it as personal estate, by describing it as so much money agreed to be laid out in land, it will then pass as personal estate, and by a will not attested by three witnesses; so that this seems to depend on the intention of the party, without whose particular interposition it is, *primâ facie*, land, and will belong to the representative of the real estate. III. 221, 222 (N)

Where a plea is ordered to stand for an answer, it must be intended a sufficient answer, and consequently the plaintiff cannot except to it. III. 239

The words, "*I devise all my temporal* "*estate*," the same as "*I devise all* "*my worldly estate*," and pass a fee; and this is the plainer, where it is afterwards said, all the rest of my real estate, the word *rest* being a term of relation. III. 295

If I devise all my lands and hereditaments in *Dale*, and have a manor in *Dale;* the manor, as it is an hereditament in *Dale*, will pass: but if I have a manor in *Dale*, and also land there which is not parcel of the manor, it is a question whether the manor will pass by a devise of all my lands. III. 322

If I have freehold and copyhold lands in *Dale*, and devise all my lands and hereditaments in *Dale* to pay my debts; only my freehold shall pass, if that be sufficient; *secus*, if I have surrendered my copyhold to the use of my will. *ibid.*

One by will gives all his household goods and implements of household; the malt, hops, beer, ale, and other victuals in the house, do not pass; but the clock, if not fixed to the house shall pass: but not the guns or pistols, if used as arms in riding or shooting game. III. 334

One has no land in *A.*, but has tithes there, and devises all his land in *A.*, the tithes, as they are issuing out of the land and part of the profits thereof, shall pass. III. 386

One with lemon juice takes out a receipt written on the inside of a bank note, but called an indorsement;

this held to be rasing an indorsement within 8 & 9 *W.* 3. *cap.* 19. *sect.* 36., and to be felony without clergy. III. 419

If there be a proper known word to express a thing by, no description, though with an *Anglicè*, shall be sufficient. III. 433 (N)

What is meant by a clerk convict. III. 444

In what cases, and under what circumstances, an affirmative law, without negative words, may repeal or take away the force of a former law. III. 491

See also DEVISE, WILL.

EXTENT.

Where a judgment was given to a Papist, it was determined he could not extend the land, since that would give him an interest in the land, contrary to the express words of 11 & 12 *W.* 3. *cap.* 4. III. 46 (N)

If the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration. So if a judgment be given in trust for a feme sole, who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if the feme has a decree to hold and enjoy lands, until a debt due to her is paid, and she is in possession of the land under this decree, and marries; the husband may assign it without any consideration; for it is in nature of an extent. III. 200

EXTINGUISHMENT, OR MERGER.

Feme gives a bond to her intended husband, that in case of her marriage she will convey her lands to him in fee; they marry, the wife dies without issue, and then the husband dies; the bond though extinguished at law, yet is good evidence of the agreement in equity, and the heir of the husband shall compel a specific performance against the heir of the wife. II. 243

One having a sum of money charged upon land secured by a term in a third person, levies a fine of the land; this extinguishes his right to the charge; so if he suffers a recovery. II. 605

Where 100*l.* is charged upon a real estate, which estate itself comes to the person entitled to the money, if in fee, the charge is merged: but where the 100*l.* charged is secured by a term or other legal estate in a third person, there the charge is not merged; nor if the estate which comes to the person entitled to the money be only an estate tail. II. 604

A. is a copyholder in tail, the lord grants the freehold of the copyhold to him in fee; the copyhold, though intailed, is extinguished. III. 9

Quære autem, If *A.* be a copyholder in tail, remainder to *B.* in fee, and *A.* takes a grant from the lord, of the freehold to him and his heirs, and dies without issue; is not *B.* in whom there was once a vested remainder in fee of the premises, entitled to the same? III. 10 (N)

Where one has a term for years as executor, and afterwards purchases the inheritance, without having assigned the term; the term is not hereby merged, lest it should occasion a *devastavit.* III. 329 (N)

F.

FACTORS.

If I send goods to a factor to dispose of for my use, and he becomes a bankrupt, these goods are not liable to the debts of such bankrupt. III. 185

A trader in *London* having money of *J. S.* (who resided in *Holland*,) in his hands, bought *South Sea* Stock, as factor for *J. S.*, and took the stock in his own name, but entered it in his account book, as bought for *J. S.*, after which the trader became a bankrupt; this trust stock not liable to the bankruptcy. III. 187 (N)

Brokers or factors who act for their principals, not liable in their own capacities. III. 279

FATHER AND CHILD.

Father buys an estate in the name of his younger son and of a trustee; this shall be taken as an advancement; so though a reversion be settled on the younger son expectant on his mother's death. I. 111

A parent makes a purchase in his child's name, and takes the profits during the infancy of such child; this will be construed to have been done as guardian only; *secus*, where the parent continues to take the profits after the child's coming of age; for this may be construed a trust for the parent. I. 111, 608

The father covenants to settle an estate on the marriage of his son, who privately agrees to repay so much out of it to the father; the son being in such case under the awe of his parent, and not supposed to act freely, equity will relieve against such private agreement. I. 121

A son in plentiful circumstances gives his father a bond to pay him 120*l.* annuity for his life; if done freely, and without coercion, good; and what words or circumstances will not be construed a coercion. I. 607

If a father in low circumstances endeavours to marry his own child to one who has an estate not any ways proportionable, the Court of Chancery will interpose. I. 705

A father or mother may be cousin to their son, and as such inherit to him notwithstanding the relation of father, &c. II. 613

A father intrusts his heir apparent, then an infant, to the care of a servant. The heir comes of age; the servant takes a bond from the heir, which bond is secreted from the father, and the heir has not wherewithal to pay the bond; equity will set the bond aside, as obtained by fraud, and a breach of trust. III. 129

The guardianship of a child does by the law of nature belong to the father, who is at liberty, in a peaceable manner, to take him wherever he finds him. III. 154, 155

The father is the proper judge of what is a fit provision for his child, for which reason the Court of Chancery will supply the want of a surrender of a copyhold devised by a father to his child, notwithstanding he has otherwise provided for him. III. 284, 285

FEE-FARM RENT.

See titles DISTRESS, RENT.

FEE-SIMPLE AND FEE TAIL.

See ESTATE.

FELONY.

Where the husband was attainted of felony, and pardoned on condition of transportation; and afterwards the wife became entitled to some personal estate as orphan to a freeman of *London*; this personal estate was decreed to belong to the wife as to a feme sole. III. 37

A bill in equity lies not to compel the performance of an agreement to pay money in consideration of having stifled a prosecution of felony. III. 279

One with lemon juice takes out a receipt written on the inside of a banknote, but called an indorsement; this held to be rasing an indorsement within 8 & 9 *W.* 3. *cap.* 19. *sect.* 36. and to be felony without benefit of clergy. III. 419

One convicted of felony within benefit of clergy, and sentenced to be transported for seven years, continues a felon, till actual transportation and service, pursuant to the sentence; and if a stranger assist such felon convict, being in custody under sentence of transportation, to escape out of prison, (provided it be such an assistance as in law amounts to a receiving, harbouring, or comforting such felon;) the person assisting is accessary to the felony after the fact: but then in the indictment for this last offence, it must be charged, that the offender had notice of the other felony or conviction. III. 439

Where the indictment has not well charged a felony, nor the special verdict certainly found any upon the facts therein stated, and consequently it is uncertain whether the prisoner be guilty of any felony at all, or only of a misdemeanor; or where in such case the prisoner demurs to the indictment; in all these cases the judgment given must be a judgment of acquittal: but this will be no bar to another indictment constituting a different offence. III. 499

See also OUTLAWRY.

FEME COVERT.

See BARON AND FEME.

FIERI FACIAS.

See EXECUTION.

FINE.

A fine cannot be levied of money agreed to be laid out in land and settled in tail: but a decree can bind such money equally as a fine could the land. I. 130

Though a fine levied by lessee for years, or at will, be void, yet it is otherwise where levied by one having a defeasible right, and such lessee joins with them. I. 520

Husband seised in right of his wife of a share in the *New River* water; the wife cannot be barred but by a fine; and where they both without a fine mortgage such share, the wife's paying interest after the husband's death will not affirm such mortgage. II. 127

A trust estate not forfeited by a fine. II. 146

Vide also TRUST.

By marriage articles money is agreed to be invested in a purchase, and settled on *A.* in tail, remainder to *A.* in fee. *A.* has neither wife nor issue, and might by a fine only dispose of the lands if settled; yet the Lord *King* would not order the money to be paid to *A.*; *a fortiori* not, if there had been wife or issue. III. 13

But this is contrary to the opinion of the Lord *Macclesfield*, and (as it is presumed) to the present practice. III. 14 (N)

The levying a fine is a thing of time, in regard of the many offices through which it is to pass; and the writ of covenant is to be under the great seal; by which means the tenant in tail may be prevented from levying such fine, though ever so much intended by him. III. 14 (N)

A. and *B.* tenants in common of lands in fee; *A.* devised his moiety in fee; after which *A.* and *B.* made partition by deed and fine, declaring the use as to one moiety in severalty to *A.* in fee, and as to the other moiety in severalty to *B.* in fee. Certified by the Judges of *B. R.* with whom the Lord Chancellor concurred, that the will of *A.* was not revoked by the deed, and fine levied in pursuance thereof. III. 169, 170 (N)

Where the husband for a valuable consideration covenants that his wife shall join with him in a fine; equity will enforce a performance of such covenant. III. 189

Quære autem, If it can be made appear to have been impossible for the husband to procure the concurrence of his wife, (as suppose there are differences between them) and the husband offers to return all the money with interest, and to answer all the damages, whether in such a case equity would not discharge the husband from his agreement? III. 189 (N)

A fine and five years non-claim held, in favour of a purchaser, to bar a trust term though the *cestui que trust* was an infant. III. 310 (N)

Lands are devised to *A.* and *B.*, and to the heirs of the survivor, in trust to sell; though the inheritance be in abeyance, yet the trustees by a fine may make a good title by estoppel. III. 372

Fine sur concesserunt.

A church lease for three lives was devised to *A.* for life, remainder to *B.* her husband for life, remainder to the first and every other son of *B.* by *A.* in tail, remainder to the heirs female of *B.* by *A.* in tail, remainder to the right heirs of *A.* *B.* died, whereupon his son *C.* (whom he had by *A.*) brought his bill, praying, that the

leasehold premises (some of the lives whereby the same were held being dropped) might be renewed and settled on *A.* for life, remainder to the plaintiff and his heirs; the court ordered that a fine *sur concesserunt* should be levied by *A.* and *C.*, and that by a proper conveyance of lease and release the premises should be conveyed in trust to *A.* for life, remainder to the plaintiff *C.* and his heirs. III. 266 (N)

Fine relating to Copyhold. See COPYHOLD.

FLEET PRISON.

One who has been a prisoner in *Newgate* for debt, but afterwards removed to the *Fleet*, is excommunicated; the Court of Chancery will not order the cursitor to make out the writ of *excommunicato capiendo* to the warden of the *Fleet;* but the writ may be directed to the sheriff, who may return a *non est inventus*, on which return the court of *B. R.* may grant an *habeas corpus* to bring up the prisoner, and thereon charge him with an *excommunicato capiendo.* III. 55

The Court of Chancery sends attachments to the warden of the *Fleet.* *ibid.*

FORECLOSURE.

See MORTGAGE.

FOREIGN COUNTRY.

An uninhabited country newly found out and inhabited by the *English*, to be governed by the laws of *England.* II. 75

A conquered country to be governed by such laws as the conqueror will impose; but until the conqueror gives them new laws, they are to be governed by their own laws, unless where these last are contrary to the laws of God, or totally silent. *ibid.*

FOREIGN COURTS.

See COURTS.

FOREIGN LAWS.

Foreign laws and customs, as of *France*, *Holland*, &c. must be proved, else the court cannot take notice of them. I. 431

FOREIGN PLEA.

No foreign plea to be admitted after a general imparlance. I. 477

FORFEITURE.

Father gives his son 40*l.* upon condition that he does not disturb his trustees; on the trustees applying for an execution of the trust, the son decreed either to join in a sale of the premises, or else to forfeit his 40*l.* legacy. I. 136

How far equity will assist one to take advantage of a forfeiture. I. 353

A trust estate not forfeited by a fine. II. 146

Baron and feme defendants to a bill. The feme must answer, notwithstanding her answer cannot be read against her husband; but the feme is not bound to answer any bill that may subject her to a forfeiture, though her husband has submitted to answer. III. 238

A defendant not bound to answer what tends to accuse him of maintenance, or of buying pretensed rights within the statute of 32 *H.* 8. *cap.* 9. *sect.* 2. III. 375

FORGERY.

One transfers *South-sea* stock by a forged letter of attorney; the transfer adjudged void, and the right owner not hurt, and the dividends received under this forged letter of attorney to be taken back from the assignee and restored to the right owner. II. 76

FRAUD.

Devisee under a will defectively executed, represents the will duly executed and for a small sum gains a release from the heir; release set aside. I. 239

Where there is either *suppressio veri* or *suggestio falsi*, it is good reason to set aside any grant or release. *ibid.*

A will of land may be good at law, as being well executed, and yet set aside in equity, as if obtained by fraud. I. 288

Where an executor proves a will of a personal estate wherein one of the legacies is forged, the executor has no remedy in equity for this fraud, but ought to have proved the will, with a special reservation as to that legacy. I. 388

Where the first mortgagee is a witness to the second mortgage, though no actual proof of his having known the contents thereof, yet since it will be presumed that he might have known the same, this shall postpone him. I. 394

One makes a voluntary settlement on her nephew, keeping the deed in her custody, and in the said settlement there is no power of revocation; afterwards the father of the nephew by stealth gets an attested copy of the settlement, and then the aunt having burnt the deed, settles the premises on another nephew; the first nephew's bill to establish the copy of the first settlement, dismissed with costs, and on the second nephew's bill the attested copy decreed to be delivered up, as having been indirectly gained. I. 577

Of two voluntary settlements, if the first be made absolute against the intention of the party, the second shall prevail. I. 581

On a bill to set aside a decree against an infant for fraud, if such decree be not fraudulent, though in every respect not so equitable, court will do nothing in it. I. 734

Equity will assist a composition of a debt, if obtained without fraud, and on a fair representation. I. 751

On suggestion of a gross fraud, the court will upon an original bill overrule a plea of a decree, and a report made and confirmed thereon, if the suggestion of fraud be not denied. II. 73

All frauds are cognizable in equity as well as at law. II. 156, 220

A conveyance by a weak man for a small consideration set aside. II. 203

A different consideration from what is expressed in the deed not to be averred; and though the consideration of blood be a good one, yet that not to be regarded, if money, or the grant of an annuity, be expressed in the deed; also a good objection that the grant is to two, and only one of kin. II. 204

Evidence of fraud, when no proof that any instructions were given for preparing the deed by the grantor, or when the deed was not read to him. II. 205

There is a diversity betwixt a deed and a will gained from a weak man, and upon a misrepresentation; in regard equity will set aside the former, but not the latter. II. 270

A decree gained by fraud may be set aside by petition only. III. 111

A father intrusts his heir apparent, then an infant, to the care of a servant; the heir comes of age; the servant takes a bond from the heir, which bond is secreted from the father, and the heir has not wherewithal to pay the bond; equity will set aside the bond as obtained by fraud, and a breach of trust. III. 129

A weak man gives a bond; if it be attended with no fraud, &c. equity will not set it aside merely for the weakness of the obligor, if he be *compos mentis*. III. 130

The having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in those circumstances, for this were to encourage drunkenness; *secus*, if through the management or contrivance of him who gained the deed, &c. the party from whom it was gained was drawn into drink. III. 130 (N)

A bill in equity lies to compel the performance of an agreement to stop a prosecution at law for a fraud. III. 279

Fraud cognizable in equity as well as at law. *ibid.*

The first mortgagee permits the mortgagor to keep the title deeds, and the mortgagor shewing a fair title, mortgages the premises to a second mortgagee, to whom he delivers the deeds; the first mortgagee is accessary to the drawing in of the second, and shall

not compel the delivery of the writings from him without paying him his mortgage money. III. 280, 281

A bond or mortgage is good evidence of a debt: but in case fraud appears, the obligee, &c. ought to prove actual payment. III. 289

A subsequent deliberate act confirming an unreasonable bargain, when the party is fully informed of every thing, and under no fraud nor surprise, shall make the bargain good. III. 294

If a man devises lands in fee to *B.* who dies in the life of the testator, and the testator's heir taking it that the heir of *B.* is entitled, for a trifling consideration conveys and confirms the estate to him; equity will relieve. III. 318

A. by his interest with the commissioners of excise, gets an office in that branch of the revenue for *B.* who in consideration thereof gives a bond to *A.* to pay him 10*l. per annum* as long as *B.* enjoys the place; equity will relieve against the bond. III. 391

See also DEEDS, VOLUNTARY; *underhand* AGREEMENT; *catching Bargain* under Title HEIR.

Statute of Frauds. See AGREEMENT *parol.*

FREEHOLD.

Things fixed thereto. See also *Matters controverted betwixt the Heir and Executor*, under title HEIR, REAL ESTATE, PERSONAL ESTATE.

Hangings, chimney-glasses, or pier-glasses, are matters of ornament and furniture, and not to go with the house. I. 94

One devises lands to his executors for and until payment of his debts, and then to *A.* for life, &c. this but a chattel interest in the executors, and the freehold well vests in *A.* I. 509

A trustee or executor cannot change the nature of the trust estate, by turning a lease for years into a freehold. III. 100

Though a freehold be not distributable in the spiritual court, it is in equity. III. 102

Where a man makes his will, and afterwards purchases a freehold, such estate cannot pass by the will made by the purchase, without a new publication. III. 170, 171

At common law, and before the statute of frauds, if a man had granted a rent to *A.* his executors and assigns, during the life of *B.*, and afterwards the grantee had died, leaving an executor, but no assignee, the executor should not have had the rent, in regard it being a freehold the same could not descend to an executor. III. 264 (N)

Freehold, Descendible. See OCCUPANT.

G.

GAVELKIND.

All lands in *England* before the conquest were in nature of gavelkind, and after the introduction of tenures by knight's service, yet has the right of representation continued. I. 64

As if one of the sons dies in the life of the father, leaving a daughter, and afterwards the father dies, the daughter shall have her father's share. I. 65

All lands in *Kent* are presumed to be gavelkind. I. 475

Where lands of the nature of gavelkind are in settlement, the unsettled reversion continues part of the old estate, and shall descend in gavelkind. III. 63

GOODS,

And what passes by the Devise thereof, see EXPOSITION OF WORDS.

GRANT.

How, and in what respects a devise of a chattel interest differs from a grant thereof. I. 575

One seised in fee of an hundred, and of lands in the hundred, grants the hundred; this passes only the franchise, and not the lands in the hundred. II. 400

One seised in fee of a manor, grants a

rent out of it to a charity for the support of several poor persons, and afterwards grants the manor in fee to *J. S.*, the nomination of the poor persons belongs to the heir of the grantor, and does not pass with the manor. III. 145

Things lying in grant, as an advowson, seem extendible in an *elegit*. III. 401

GUARDIAN.

An executor pays a legacy given to a child, to the father as guardian; this ill, notwithstanding the testator by parol on his death-bed had directed it. I. 285

Guardians appointed by will, according to 12 *Car.* 2. *cap.* 24. have no more power than guardians in socage, and are but trustees, on whose misbehaviour, or giving occasion for suspicion, the Court of Chancery will interpose. I. 703

If a father in low circumstances endeavours to marry his own child to one who has an estate not any ways proportionable, the Court of Chancery will interpose. I. 705

A will recommends it to guardians to act with the advice of *J. S.* who is afterwards attainted; this superintendency devolves upon the great seal. I. 706

Where a guardianship is devised to three, without saying, and to the survivors or survivor of them, yet the survivor shall take. II. 102

A guardianship being an authority coupled with an interest. II. 108, 122

The punishment inflicted by the law on such as married a ward without the consent of the guardian. II. 111

On this court's committing the custody of an infant to the care of any one, such committee enters into a recognizance that the infant shall not marry without leave of the court. II. 112

Where the right of guardianship is in dispute, the court will upon petition only, without bill or decree, make orders touching the determination thereof. II. 118

Though an infant cannot bring a bill for an account against his guardian until his coming of age, yet a third person may, even during the minority of the infant. II. 119

Not a reasonable maxim, that the next of kin to whom the land may descend shall not be guardian in socage. II. 262

Where an estate in mortgage descends to an infant, the guardian ought not to permit the interest to grow in arrear, but out of the profits of the estate to keep it down. II. 279

One of the guardians of an infant girl of about nine years old, takes her from a boarding school and marries her to his own son who has no estate; the court ordered the guardian to produce the girl in court, and then committed her to the other guardian, ordering an information to be brought against the guardian who married the ward to her disparagement; but held this to be no contempt, the ward not being under the immediate care of the court. II. 561

Where an infant is defendant, the service of the *subpœna* to hear judgment must be on the guardian, not on the infant. II. 643

A presbyterian who had three infant daughters brought up that way, and had three brothers presbyterians, made his will, appointing his brothers, and also a clergyman of the church of *England*, guardians to his three infant daughters, and dies, having sent his eldest daughter to his next brother. The clergyman gets two of the daughters into his custody, and places them at a boarding-school, where they were bred according to the church of *England*, and brought his bill to have the eldest daughter placed out with the other daughters. The three brothers that were presbyterians brought their bill to have the two daughters delivered to them; the court declared no proof out of the will ought to be admitted in the case of a devise of a guardianship, any more than in the case of a devise of land. III. 51

A guardian cannot alter the nature of the infant's estate, by turning the personal into a real estate, *et e converso*. III. 100

One through a great age being deprived

of his memory, and almost become *non compos*, was admitted to answer by his guardian, the demand in question being but small. III. 111 (N)
The marrying an infant ward of the Court of Chancery is a contempt, though the parties concerned in such marriage had no notice that the infant was a ward of the court; all acts of the court, as the commitment of a wardship, and in a cause depending, to be taken notice of by every one at his peril. III. 116, 117
So where one not a freeman of *London* married a city orphan, though it did not appear the party had any notice of his wife's being a city orphan, yet he was held punishable by the court of orphans. III. 118 (N)
The guardianship of the child does by the law of nature belong to the father; and the right thereto cannot be taken from him by any other person's giving a legacy though never so great, and the father is at liberty to take such child wherever he can meet with him, though not by force. III. 154, 155
Quære is concerning the proper remedies for the recovery of a ward, such as the writ of ravishment of ward, *homine replegiando*, and *habeas corpus;* and whether, if a person be brought into court by virtue of the latter, and declares he is under no force, the court will deliver him into the custody of another. III. 154 (N)
Whether the writ of *ejectione custodiæ* be not the most proper method whereby to try the right of guardianship. *ibid.*
An infant's answer cannot be given in evidence against him, because the guardian, and not the infant, is sworn to such answer. III. 237
Also the *subpœna* to hear judgment must be served on the guardian. *ibid.* (N)
If the infant plaintiff's guardian or *prochein amy* neglects to put in a replication to a defendant's answer; *Quære*, Whether such answer shall be read and admitted to be true, though never so detrimental to the infant's inheritance? *ibid.*
An allowance of maintenance to a guardian must be in regard to what the infant then had, and not to what falls in afterwards. III. 368
See also INFANT, TRUSTEE.

H.

HABEAS CORPUS.

See WRITS.

HEIR.

Heir and Ancestor.

Heir not always, and of necessity, to be intended a word of limitation. I. 59
So where the devise was to the heirs male of *J. S.* begotten; *J. S.* having a son, and the testator taking notice that *J. S.* was then living; this is a sufficient description of the testator's meaning, and the son allowed to take, though strictly speaking he was not heir. I. 229
A voluntary conveyance made to the brother of the half blood, but which was defective at law, made good by a court of equity against the heir. I. 60
Though where there is not that consideration of blood, a voluntary conveyance of a copyhold, or other estate, will not be helped in equity against the heir. I. 354
One seised of lands in fee binds himself and his heirs in a bond, and having devised his lands to *J. S.* in fee, dies; in a bill brought by the obligee to subject the lands devised, the devisor's heir must be made a party. I. 99
In a devise to a man and his heirs, the word *heirs* is used only to measure out the quantity of estate which the devisee is to take, and not as a word of purchase; for which reason if the devisee dies in the life of the devisor, his heirs shall not take. I. 397
An heir at law, or heir male to the honour of the family, if probable cause to contend for the family estate, shall not pay costs. I. 481
One seised in fee mortgages to *A.*, and afterwards binds himself and his heirs by bond to *A.* and dies; if the heir

comes to redeem, he must pay the bond-debt as well as the mortgage: but if the heir assigns the equity of redemption to *J. S.*, he shall redeem upon payment of the mortgage only. I. 775

Devise to *A.* for life, remainder to the right heirs of *J. S.* (then living); the fee-simple descends to the heir at law of the testator until the contingency happens. I. 516

An heir, in an action brought against him by a bond-creditor, is sued as for his own debt in the *debet* and *detinet;* and before the statute of 4 and 5 *W.* and *M. cap.* 14. on his having aliened before action brought, was responsible in equity for the value of the land aliened. I. 777

One seised in fee devises lands to his granddaughter for life, remainder to his right heirs male for ever, and dies, leaving his grandson his heir at law, and a deceased brother's son his next male heir; the devise of the remainder is void. II. 1

One seised in fee, as heir of the mother's mother, devises the land to trustees in fee, in trust to pay several annuities, the residue to go to the testator's right heirs of his mother's side for ever; the heir of the mother's mother's side entitled to the estate and surplus of the profits after the annuities paid. II. 135

A will not attested as the statute of frauds requires shall not pass any estate, of which the heir, as heir, would otherwise have had the benefit. II. 238

On a bill brought by a devisee against an heir to prove the will, the heir cross-examines the plaintiff's witnesses, and refuses to release his right, yet the heir shall have his costs given him on motion; otherwise if he examines witnesses of his own. II. 285

A younger brother beyond sea having contracted to buy a real estate of his elder brother, makes his will, charging his estate with great legacies, but his will was attested only by two witnesses; afterwards the testator dies without issue, leaving his elder brother his executor and heir; the heir may retain out of the assets the whole purchase money though entitled again to the land as heir. II. 291

A provision made by a father of land for an heir is not to be brought into hotchpot. II. 440

A father or mother may be cousin to the son, and as such inherit to him, notwithstanding the relation of father, &c. II. 613

Though the law will not allow a brother of the half blood to be heir, but prefers the uncle, yet there is no solid reason for it, the uncle being not only more remote, but having only half the blood, *viz.* only the blood of the father. II. 735

One binds himself and his heir in a bond, and mortgages some lands, of which he is seised in fee, for more than the value; the heir has 200*l.* for joining in a sale of the premisses; this 200*l.* held not to be assets. III. 10

One has two sons *A.* and *B.*, and three daughters, and devises his lands to be sold for payment of his debts; and as to the monies arising by sale after debts paid, he gives 200*l.* thereout to his eldest son *A.* at twenty-one, the residue to his four younger children equally; *A.* the eldest dies before twenty-one; this 200*l.* shall go to the heir of the testator. III. 20

The heir the universal representative of his ancestor, and not to be disinherited by doubtful words. III. 61

In a devise of lands to pay debts, if the creditors bring a bill to compel a sale, the heir is generally to be made a party; *secus* in the case of a trust created by deed to pay debts. III. 92

If a copyhold be made liable to pay debts, and the charge being but equitable, the legal estate of the copyhold descends to the heir, in a bill brought by the creditors praying a sale, it seems necessary to make the heir a party, otherwise the legal estate of the copyhold cannot be conveyed to a purchaser; but in case it appears that the heir at law has, since the testator's death, conveyed away all the copyhold, then the grantee of the heir being capable of conveying to the purchaser, it may

not be necessary to make the heir a party. III. 97 (N)
A father intrusts his heir apparent, then an infant, to the care of a servant. The heir comes of age: the servant takes a bond from the heir, which bond is secreted from the father, and the heir has not wherewithal to pay the bond; equity will set aside the bond as obtained by fraud. III. 129
Heirs, when of age, are under the care of equity, and then want it most, the law taking care of them till that time. III. 131
One seized in fee of a manor, grants a rent in fee out of it, as a charity, for the support of several poor persons, and afterwards grants the manor to *J. S.* in fee; the nomination of the poor persons does not go with the manor, but belongs to the heir of the grantor. III. 145
Though by the statute of frauds an estate to a man and his heirs for three lives is made liable to pay debts, yet it is only such debts as bind the heir. III. 166
One articles to buy land, and the title is under a will not proved in equity against the heir; yet in some cases equity will compel the purchaser to accept the title. III. 190
Money agreed to be laid out in land shall be taken as land, and go to the heir; and no difference where the money thus agreed to be laid out and settled, is deposited in the hands of trustees, and where it remains in the hands of the covenantor. III. 211
One devises a rent-charge to be sold to pay legacies amounting to 800*l.*, and if the rent-charge should sell for 1000*l.* the testator gives a further legacy of 200*l.*, the rent-charge sells for above 800*l.* and less than 1000*l.*, what exceeds the 800*l.* shall belong to the heir as a resulting trust. III. 252
A mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's right of dower; decreed that the heir of the mortgagor, on his bringing a bill to redeem, should have the benefit of it. *ibid.* (N)
Where the heir is totally disinherited, equity will not supply the want of a surrender of a copyhold in favour of a younger child. III. 284, 285
But a slight equity for an heir to say he wants the deeds and writings, unless he claims under some deed of intail, concealed from him by the defendant. III. 296
In a bill brought by a mortgagee to foreclose, it is sufficient to make the heir only of the mortgagor a party. III. 333 (N)
Although there be no covenant or bond in a mortgage, yet the heir of a mortgagor shall compel an application of the personal estate in exoneration of his land. III. 358
One dies indebted by bond, and seised in fee of divers lands, part of which he devises to *J. S.*, and other part he permits to descend to his heir; the lands descended shall in the first place be liable to pay the bond debts. III. 367
Quære autem, Whether if the testator had devised any part to the heir, the other devisee must not have contributed *pro rata?* *ibid.* (N)
In the case of lands in fee descending on an infant, the parol shall demur in equity as well as at law. III. 368
An heir at law is made a defendant, and insists on his title; he shall have his costs though it goes against him; but if an heir at law be plaintiff, and miscarries in his suit, he shall not have costs; but on his suit appearing to be groundless, he shall pay costs. III. 373
See also Assets, Executor, Parties, *Resulting* Trust.

Matters controverted between the Heir and Executor.

Hangings, chimney-glasses, or pier-glasses, as matters of ornament and furniture, go to the executors, and not with the house. I. 94
Where money put out on securities was by marriage articles assigned in trust to be invested in land and settled on the husband for life, remainder to the wife for life, remainder to the first and every other son in tail male, remainder to the daughters in tail, re-

mainder to the right heirs of the husband, and the husband, having altered some of these securities, and put them out in trust for himself his executors and administrators, devised his real estate in the county and city of *York*, and elsewhere in *Great Britain*, to *J. S.*, but gave his personal estate and all his securities for monies to his wife, whom he made executrix, and afterwards died without issue; decreed that as to the money on such securities as had not been altered by the husband, this was by the articles turned into land, and should descend to the heir; but that with respect to the securities which were altered by the husband, and the money placed out in trust for himself, &c. these should pass to the wife as personal estate. I. 172

Lessor dies on *Michaelmas-day* and before sun-set, the heir or jointress, not the executor, shall have the rent. I. 177

But if the tenant had paid the rent on the day, the payment had been good, though the lessor had died before sun-set, but his executors to account for this rent to the jointress. I. 180

Quære tamen.

One settles lands, on his marriage, on himself and wife, and issue of the marriage, and conveys bankers' assignments which are but personal estate in trust, declaring the profit thereof to go to the same person as by the settlement would be entitled to the land; and if the annuity shall be redeemed by parliament, the money to be invested in land, and to be settled to the same uses; these annuities and bankers' assignments, after the wife's death, shall go to the heir, and not to the executor. I. 205

An incumbent of a church purchases the inheritance of the advowson and dies; his heir, and not his executor, shall present. I. 364

Where money is covenanted to be laid out in a purchase of land to be settled on *A.* in fee; on *A.*'s dying before the money is laid out, his heir, and not his executor, shall have it. I. 483

But if *A.* himself has received any part of the money, this is a good payment, and shall not be repaid by the executor to his heir. I. 483

So on *A.'s* death, his heir shall recover the remainder of the money not received by him. *ibid.*

In like manner, if *A.'s* heir is an infant, and the remainder of the money is decreed to be brought into court, it shall be looked upon as land. I. 486

J. S., lessee of land to him and his heirs for three lives, assigns over the whole estate, reserving a rent to himself, and his executors, and dies; his executor, and not his heir, shall be entitled to the rent. I. 555

See more under RENT, and *Personal Estate.*

Where, although by a voluntary contract, money is agreed to be laid out in land, the court will execute such agreement in favour of the heir. II. 171

In all cases where it is a measuring cast between an executor and an heir, the latter shall in equity have the preference. II. 176

One articles to buy lands, and dies; his executor shall pay the money, but his heir shall have the lands. II. 632

A. covenants for himself and his heirs, that he will purchase lands, and settle the same on himself for life, remainder to his wife for life, remainder to his first, &c. son in tail, remainder to himself in fee: equity will compel the executor to lay out the money, though the heir be both debtor and creditor. III. 224

Every mortgage, though without any covenant or bond to pay the money, implies a loan, and every loan implies a debt; therefore an heir of a mortgagor shall compel an application of the personal estate to pay off a mortgage, notwithstanding there was no covenant, &c. from the mortgagor. III. 358

Catching Bargains.

A devisee under a will defectively executed represents the will as duly executed, and for a small sum gains a re-

lease from the heir, the release set aside. I. 239
A son, who after his father's death is a remainder-man in tail, sells his remainder at an under-rate; the court set aside the conveyance. I. 310
A. having 500*l.* given him by his uncle, in case he should survive the testator's wife, sells it for 100*l.* to be paid by 5*l. per ann.*, but that if the testator's wife should die before *A.* and the legacy become due, in such case the rest of the money to be paid within a year then next. *A.* does survive the testator's wife, and knows the legacy was become due to him, and being fully apprised of the whole fact, confirms the bargain; he shall be bound thereby. III. 290
Though had all depended on the first assignment, the court would have set it aside, as being an unreasonable advantage made of a necessitous man. III. 294
An heir of about twenty-seven years of age, and who had a commission in the guards, borrowed 500*l.* on condition to pay 1000*l.* if he survived his father and father-in-law; but if he died before his father and father-in-law, then the lender to lose the 500*l.* The heir survived his father and father-in law, and was relieved, though after he had paid the money, it being for fear of an execution. III. 292 (N)
Unreasonable bargains made with an heir in his father's life-time relieved against, and why. III. 293

HOKETIDE, HOCDAY, OR HOCTIDE.

From whence derived, and what it signifies. III. 17 (N)

HOTCHPOT.

If the mother being a widow, advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotchpot. II. 356
A. devises all his real and personal estate to his executors and their heirs, in trust to sell and pay all his debts; his real estate being only equitable assets, and the testator leaving debts by bond and simple contract, if the bond creditors are paid part out of the personal estate, they shall bring it back again into hotchpot, or shall not have any thing out of the real estate. II. 416
Husband by marriage settlement secures a portion for daughters of the marriage in default of issue male; there is one daughter only, the husband survives that wife, and marrying again, leaves issue by the second wife, and dies intestate, the daughter by the first marriage being an infant, and her portion not then due; if the daughter lives till the portion is due, it is an advancement *pro tanto*, and must be brought into hotchpot as to the other issue. II. 435
Provision for a child by the will of the father not to be brought into hotchpot, nor a provision of land for an heir. II. 440
One settles a rent out of lands upon a younger child; this is an advancement *pro tanto*, and must be brought into hotchpot. II. 441
An annuity settled by a father upon a child to commence after the father's death, is an advancement *pro tanto*, and must be brought into hotchpot, as must a contingent provision, when such contingency happens. II. 442
The rather as contingent debts are within the statute of distribution. II. 449
A provision made for a child, either by a voluntary settlement or for a good consideration, is an advancement *pro tanto*, and must be brought into hotchpot. II. 444
So, though the portion be not paid, yet if secured to the child in the father's life-time, although not payable till after the father's death. II. 445
Maintenance money for a child not to be taken as an advancement. II. 449
A father advances one of his children in part; the child dies, after which the father dies intestate; the issue of the dead child claiming a distributive share, shall bring into hotchpot what their father has received. II. 560
See also DISTRIBUTION, LONDON.

HOUSEHOLD GOODS.

What passes by the Devise thereof, see EXPOSITION OF WORDS.

HUNDRED.

In an action against the hundred for a robbery, where the suit must be commenced within a limited time, or if the time be so far elapsed, as that the statute of limitations would be a bar, were the judgment to be reversed, the court, after a writ of error, brought to reverse the judgment for want of an original, will give the party leave to file one; *secus*, where the plaintiff may begin a new action. I. 412

Instructions for an original against an hundred for a robbery were brought to the cursitor within the year, but the writ passed the great seal after the year, though tested within the year, (*viz.*) when the instructions were brought; this held good, being warranted by the practice of the cursitor's office. I. 437

One seised in fee of an hundred, and of lands in the hundred, grants the hundred; this passes only the franchise, and not the lands in the hundred. II. 400

I.—J.

IDIOT AND LUNATIC.

Where the husband was a lunatic, the wife, though an *Irish* peeress, committed for not producing him. I. 701

A lunatic is never to be looked upon as desperate. II. 265

No objection that the committee of the lunatic's person is the next of kin, and will, on his death, come in for a share by the statute of distribution; it being for the interest of the next of kin to prolong the lunatic's life, whereby the personal estate will be increased. II. 544, 638

Father or uncle devises the custody of a lunatic son or nephew, who is above twenty-one, this is void. II. 638

The court will not grant the custody of the lunatic's person to the next heir; but the being entitled to a share of the personal estate by the statute of distribution is no objection. *ibid.*

Inconvenient to grant the custody of the lunatic to two. *ibid.*

The court allowed the profits of the lunatic's estate to the committee for the maintenance of his person. The lunatic dies, his administrator brings a bill for an account of these profits; the committee pleads this order of court of the allowance of the profits for the lunatic's maintenance; the plea ordered to stand for an answer; but the court declared they would not relieve without gross fraud. III. 104

No appeal lies from an order or decree of the Lord Chancellor or Lord Keeper, touching idiots or lunatics, to the house of Lords, but only to the King in council. III. 108

The King's grant of a lunatic's estate without account is void; but the King, or the Lord Chancellor, may allow such a yearly maintenance to a lunatic, as amounts to the clear yearly value of the lunatic's estate. III. 110

The custody of a lunatic may be granted to a feme covert, though she be not *sui juris*, but under the power of her husband. III. 111 (N)

One through great age being deprived of his memory, and become almost *non compos mentis*, was admitted to answer by his guardian, the thing in question being but small; but had it been considerable, the regular way had been to have taken out a commission of lunacy, and have gotten a committee assigned. *ibid.*

A weak man gives a bond; if it be attended with no fraud or breach of trust, equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis*. III. 130

No such thing as an equitable *non compos*, if *compos* at law. *ibid.*

By 4 *Geo.* 2. *cap.* 10., idiots and lunatics, &c., or their committees, by the

direction of the Lord Chancellor, &c. may assign over their trusts or mortgages, and be ordered to make such conveyances in like manner as trustees or mortgagees of *sane* memory. III. 389 (N)

See also COURT *of Chancery*.

JEW.

In the courts allowing maintenance out of a Jew's estate to his daughter turned Protestant by virtue of 1 *Annæ*, *cap.* 30., it is no objection, that the daughter is above forty years of age, or married, or that the Jew is dead. I. 524

IMPEDIMENTS.

See LIMITATION.

IMPLICATION.

Where the words of a devise of a leasehold would, were it in the case of a freehold, make an estate-tail only by implication; there a devise over of such leasehold is good; *secus*, where such words would make an express estate-tail. III. 259

Estate by Implication.

No estate raised by implication in a will shall destroy an express estate; as where a devise was to *A.* for life, remainder to his first and every other son in tail male, and for want of issue male of *A.* remainder over; this gave no estate-tail to *A.* by implication. I. 54, 333

Quære autem. I. 605

Secus where the limitation is not carried over to all the sons, since if the father were not to have an estate-tail, such son as is not mentioned in the limitation would be excluded. I. 59

Et vide I. 754

Where a person is entrusted to convey a fee, he must consequently and by necessary implication be supposed to have a fee. I. 171

Devise of land to the testator's second son for his life, he or his heirs paying a rent thereout to the eldest son for his life, and after the death of the second son *and his wife*, remainder to the first, &c. son of the second son; the wife of the second son had an estate for life by implication. I. 472

IMPRISONMENT.

See PRISON.

INCUMBRANCES.

See SECURITIES.

INDICTMENT.

In all indictments against one for being accessary after the fact, by receiving, harbouring, &c. a felon, it is necessary to charge, that the defendant knew the principal was guilty, or convicted of felony; and this omission is not to be helped by the verdict. III. 493

In criminal cases, though the county be in the margin, yet the place where the fact is supposed to be done must in the indictment be laid *in com' prædict'; secus* in civil cases. III. 496

Where the indictment has not well charged a felony, nor the special verdict certainly found any on the facts therein stated, or where the judgment is arrested for defects in the indictment: this will be no bar to an indictment charging a different offence. III. 499

INDORSEMENT.

One with lemon juice takes out a receipt written on the inside of a bank note, but called an indorsement; this held to be rasing an indorsement, within the 8th and 9th of *W.* 3. *cap.* 19. *sect.* 36. and to be felony without clergy. III. 419

INFANT.

One devises 1000*l.* to be laid out in a purchase of land in fee for the benefit of *A.*, *B.*, and *C.*, and their heirs, equally to be divided; *A.* dies leaving an infant heir; *B.* and *C.* may elect to

have their share of the money paid them, but the infant cannot. I. 389

Where a decree *nisi causa* is had against an infant, on the infant's coming of age, and before the decree made absolute, he may put in a new answer. I. 504

One borrows money during his infancy, applying it to the buying of necessaries, and afterwards coming to age devises his lands for the payment of his debts; these debts contracted during infancy are within the trust. I. 558

Infant borrows money and applies it towards payment of his debts for necessaries; he is liable to pay this in equity, though not at law. I. 559

No laches to be imputed to an infant. I. 718

On a bill brought to set aside a decree against an infant for fraud, if the same be not fraudulent, though in every respect not so equitable, the court will not set it aside. I. 734

Infant aggrieved by a decree, not bound to stay till he is of age, but may as soon as he thinks fit bring a bill of review, re-hear, or bring an original bill, and allege specially the errors in the former decree. I. 737

Though an infant cannot bring a bill for an account against his guardian until his coming of age, yet a third person may, even during the minority of the infant. II. 119

A feme infant seised in fee, on marriage with the consent of her guardians covenants in consideration of a settlement to convey her inheritance to her husband; if this is done in consideration of a competent settlement, equity will execute the agreement, though no action would lie at law to recover damages. II. 244

Where an estate in mortgage descends to an infant, the guardian ought not to permit the interest to grow in arrear, but out of the profits of the estate to keep it down. II. 279

An infant by *prochein amy* brings a bill and never stirs in it after he comes of age, and the bill is dismissed; the infant and *prochein amy* are both liable to pay costs. II. 297

At law an infant is liable to pay costs if the judgment be against him. II. 298

Where an infant in his bill, by mistake of his guardian, submits to any thing which will be prejudicial to him, this will not be binding, but he will be allowed to amend. II. 387

Upon a decree against an infant unless cause within six months after he comes to age, the infant may answer, make a defence, and examine witnesses anew. II. 401

An infant, when he is plaintiff, is as much bound and as little privileged as one of full age. II. 519

The court will not on motion or petition order an infant trustee to convey, unless the trust appear in writing: but in such case will leave the *cestui que trust* to get a decree by bill. II. 549

Where an infant is defendant, the service of the *subpœna* to hear judgment must be on the guardian, not on the infant. II. 643

Where one has been in possession of land belonging to an infant, if the infant when of age makes out his title, he shall recover the profits in equity from the time of the first accruing of his title, and not from the filing of his bill only. II. 645

An executor in trust for an infant cannot change the nature of the trust estate by turning money into land, or *e converso*. III. 100

Marrying an infant ward of the court is a contempt, though the parties concerned had no notice that the infant was a ward of the court. III. 116

A father left a great personal estate to two infant children, and made his wife executrix. A bill was brought in the infant's name by a relation, as *prochein amy*, to call the mother to an account; on affidavit of several other relations, that this suit in the infant's name was out of pique, and not for the infant's good, the court referred it to a master, who reporting the matter to be so, the suit was stayed, III. 140

The deed of an infant not void like that of a feme covert, but only voidable. III. 208

An infant's answer cannot be given in evidence against him, and why. III. 237

Qu. If a defendant to a bill brought in the name of an infant puts in an answer, and the infant does not reply thereto, whether the answer must not be taken to be true? *ibid.* (N)

A. tenant for life, remainder to *B.* in tail as to one moiety, remainder to *C.* an infant in tail, as to the other moiety, remainder over. There is timber on the premises greatly decaying; on a bill brought, praying that the decaying timber may be cut down; as the infant is interested in the inheritance, no timber allowed to be cut down without the approbation of the master; and the infant's moiety of the money to be put out for his benefit. III. 267

An executor, administrator, or trustee for an infant, neglects to sue within six years; the statute of limitations shall bind the infant. III. 309

In a decree of foreclosure against an infant, though the infant has six months after he comes of age to shew cause, &c. yet he cannot ravel into the account, nor even redeem, but only shew an error in the decree. III. 352

On lands in fee descending to an infant, the parol shall demur in equity as well as at law. III. 368

An allowance of maintenance to a guardian must be in respect to what the infant then had, and not to what falls in afterwards. *ibid.*

The statute of 7 *Annæ*, *cap.* 19. enabling infant trustees to convey, extends only to plain and express trusts, not to such as are implied or constructive only. III. 387

A. owed several debts, and by his will devised lands in fee to an infant, charged with all his debts and legacies; the infant not a trustee within the above mentioned act, as to so much of the lands as may suffice for the payment of the debts and legacies. III. 389 (N)

INFRANCHISEMENT.

See COPYHOLD.

INHERITANCE.

See DESCENT.

INJUNCTION.

An injunction upon an attachment, *dedimus*, or upon the defendant's praying time to answer, does not extend to stay proceedings in the spiritual court without special order. I. 301

Lessee for years without waste, remainder in fee to a bishop: lessee injoined from digging the ground for brick. I. 527

See WASTE.

In case of a trust-estate devised to be sold, or devised to *J. S.* if the will be disputed after two trials in its favour, equity will grant a perpetual injunction. I. 671

So after several trials in ejectment, and verdicts in all in favour of the will, equity, on a bill of peace, will grant a perpetual injunction. I. 672

A perpetual injunction will the rather be granted, where this court directs the trial, or where the cause, against which the verdicts are found, is odious in its nature. I. 673

One of the late directors of the *South-sea* company owes money, which is recovered against him at law; though all his estate is taken from him by the late act, yet the court denied an injunction. I. 695

Injunction granted to stay the ringing of a bell, in consequence of an agreement made for a valuable consideration. II. 268

On a bill brought to set aside a will of a personal estate for fraud, the court will deny an injunction. II. 287

Hazardous to grant an injunction to stay the working of a coal-mine. II. 389

The plaintiff gets judgment in the petty bag, after which he is stopped by an injunction. The year and day pass; the plaintiff, though hindered by the injunction, cannot yet sue out execution without a *scire facias*. III. 36

How the words in an injunction, "*Licebit autem* (for the defendant in equity) *placitum ad communem legem postulare, et ad triationem*

"*inde procedere, et pro defectu pla-*
"*citi judicium intrare,*" are to be understood. III. 146
Whether if, after service of an injunction, the defendant at law puts in a frivolous plea to an action of debt on a bond, the plaintiff having demurred thereto, and gotten it made a *concilium*, may, after argument, obtain judgment? *ibid.* (N)
Whether, after service of an injunction upon the defendant and his attorney, they may deliver a declaration? *ibid.*
Affidavits allowed to be read for the patentee of a new invention, on a motion to dissolve the injunction on coming in of the answer. III. 255
A. tenant for years, remainder to *B.* for life. *A.* is doing waste; *B.* though he cannot bring waste, as not having the inheritance, yet he is entitled to an injunction. But if it be waste of a trivial nature, much more if it be meliorating waste, as by building, the court will not injoin; nor if the reversioner or remainder-man in fee be not made a party, who possibly may approve of the waste. III. 268 (N)
After a plea put in, there can be no motion for an injunction, till the plea is argued. III. 396
See also CONTEMPT.

INN OF COURT.

A bill in equity will not lie to redeem a mortgage of chambers in an inn of court, but the plaintiff must apply to the bench, or to the judges of the society; *secus*, if on application to the bench they refer the plaintiff to his remedy in equity. II. 511

INROLMENT.

Where the court permits the inrolling of a recognizance after the time elapsed, it always takes care not to hurt an intervening purchaser. I. 340
If, after a decree, a *caveat* be entered to stay the signing an inrolling, it stays the signing twenty-eight days after the presenting the decree to the chancellor to be inrolled, and notice given by the chancellor's secretary to the clerk on the other side. I. 609
If a decree be obtained and inrolled, there is then no remedy but by bill of review. III. 371

INSURANCE.

A merchant having a doubtful account of his ship, insures it without acquainting the insurers what danger she was in; this held to be a fraudulent insurance, and the court relieved against the policy. II. 170

INTEREST OF MONEY.

When a trust is raised to pay debts, simple contract debts shall carry interest. I. 229
Interest allowed but from the time of the master's report confirmed, where the debt is not before liquidated. I. 377
Interest allowed for a ship and cargo wrongfully taken by the defendant; and this being done in the *Indies*, *Indian* interest allowed, deducting the charge of the return. I. 395
Where the master's report of the *quantum* of interest due on a mortgage is confirmed, the interest from that time becomes principal, and will carry interest. I. 453, 480, 653
One devises his personal estate to his son, and if he die under age, and without issue, then that it shall go over to the testator's brother; the son shall have the produce or interest thereof, and only the capital (in case of his death under age, and without issue,) shall go to the brother. I. 500
An annuity left the widow by the husband's will decreed to carry interest from the day on which it was payable, and not only from the subsequent day of payment after the arrear incurred. I. 543
Mortgagor reserving six *per cent.* with a proviso to take five if paid within three months; on a great arrear incurred, the court will not relieve; *secus*, in case of a small slip of time. I. 652
Where a mortgagor signs an account, whereby so much is admitted to be

due for interest; this will not carry interest, unless the mortgagor by some letter or writing under his hand agrees to make it principal. I. 653

By a marriage settlement and will 15,000*l.* was secured for a daughter's portion, payable at eighteen or marriage, the whole charged upon an estate in *Ireland:* but the settlement and will were made, and also all the parties lived, in *England;* the money decreed to be paid with *English* interest, and without deducting the charge of the return from *Ireland.* I. 696

If one by will charge his land with the payment of his debts, this is like a mortgage for his debts, which will make simple contract debts carry interest. II. 27

Equity apportions interest due upon a mortgage; *secus*, of rent. II. 176

A reversion expectant on an estate for life is decreed to be sold, *B.* is confirmed the best purchaser, and the order made absolute the 1st of *January*, 1724; on the —— day of *January*, 1726, *B.* is ordered to bring his money into the bank; the life drops; as if the life had dropped the next day after the report of *B.*'s being the best purchaser made absolute, the purchase must have stood, and as from that time the life was wearing, so from that time the purchaser ought to pay interest. II. 410

Interest recovered for a legacy, though after a receipt given in full for the legacy, and the principal legacy paid. III. 126

Though by a deed 5*l. per cent. per ann.* was directed to be allowed, yet it appearing that the money had been placed in the government funds, which yielded but 4*l. per cent.*, the court reduced the interest to 4*l.* III. 227

Tenant in tail of mortgaged lands not bound to keep down the interest, as tenant for life is, not even though the former dies during his infancy, and consequently before it was in his power to have barred the remainder by a recovery. III. 234, 235

A legacy out of a rent-charge shall carry interest. III. 254

In a poor cause, to save expense, and where the matter is clear, the court will refer it to the register instead of a master, to compute the interest or arrears of rent. III. 258

See also Mortgage, Legacy.

INTERROGATORIES.

See Deposition, Examination, Witness.

JOINTENANTS AND TENANTS IN COMMON.

A surrender of a copyhold to the use of *A.*, *B.*, and *C.*, and their heirs, equally to be divided between them and their heirs respectively; this held by two judges in *B. R.* to be a tenancy in common, by reason of the apparent intention of the surrenderor, contrary to the opinion of *Holt*, C. J. who thought it a jointenancy. I. 14

The words *equally to be divided* did not originally make a tenancy in common even in a will. I. 21

A. by will devises lands in trust, that the profits shall be equally divided between his wife and daughter (the heir of the testator) during the wife's life; by the opinion of all the judges of *C. B.* the mother and daughter are tenants in common for the wife's life. I. 34

Devise of a debt to two share and share alike, equally to be divided between them; and if either of them dies, then to the survivors and survivor of them; they are tenants in common, and not jointenants; the words relating to the survivorship being intended only to carry over the share of him that might die in the life of the testator, and preserve the lapsing thereof. *Quære tamen.* I. 96

A devise of a surplus of a personal estate to four equally, share and share alike; one of the four dies in the life of the testator; this being a devise in common, the share of the person dying is become a lapsed legacy, and distributable according to the statute. I. 700

A guardianship devised to three, without

saying, *and to the survivors and survivor of them;* yet the survivor shall have it. II. 102

A devise of lands to *A.* and *B.*, and the survivor of them and their heirs, equally to be divided betwixt them share and share alike; *A.* and *B.* are jointenants for their lives, and have several inheritances. II. 280

Devise to *A.* and *B.*, *A.* dies in the testator's lifetime; *B.* shall have the whole. II. 331

Devise of a residue of a personal estate to three is a joint devise, and shall survive. II. 347

A. makes two executors *B.* and *C.*, appointing them residuary legatees, *B.* dies; the whole shall survive to *C.* II. 529

One devises the surplus of his personal estate to his four executors; this is a joint bequest, and on the death of one of them, shall go to the survivors, as well in the case of a legacy, as of a grant. III. 115

Five persons purchased *West Thorock* level from the commissioners of sewers, and the purchase was to them as jointenants in fee: but they contributed rateably to the purchase, which was with an intent to drain the level, after which several of them died; they were held to be tenants in common in equity; and though one of these five undertakers deserted the partnership for thirty years, yet he was let in afterwards, and upon what terms. III. 158

JOINT AND SEVERAL.

If *A.* and *B.* are bound in a bond jointly and severally to *J. S.*, he may elect to sue them jointly or severally: but if he sues them jointly, he cannot sue them severally, for the pendency of the one suit may be pleaded in abatement of the other. III. 405

But if two joint traders owe a partnership debt, and one of the partners gives a bond as a collateral security for payment of this debt; here the joint debt may be sued for by the partnership creditor, who may likewise sue the bond given by one of the traders. III. 408

See also BANKRUPTS, *concerning their joint and separate Commissions.*

IRELAND.

A daughter's portion secured on an estate in *Ireland* by a settlement made in *England*, and the parties living in *England* shall be paid in *England* without deducting the charge of the return. I. 696

One by will made in *England* devises an annuity in trust for his wife out of lands in *Ireland*, the testator, his wife, and the trustees residing in *England;* the annuity shall be paid in *England*, and in *English* money, and the estate bear the charge of the return. II. 88

So if one in *England* gives by will a legacy out of lands in *Ireland*, the legacy shall be paid in *England*, and in *English* money. II. 89

The Court of Chancery in *England* may grant a sequestration against the defendant in *Ireland;* but it must be after a sequestration taken out here, and *nulla bona* returned. II. 261

ISSUE.

In case of an issue out of chancery, it is proper to move that court for costs for not going on to trial, or to move there for a special jury. II. 68

Where the wife sues the husband for a specific performance of her marriage articles, it is no bar to her demand, that she has eloped with an adulterer, especially if this be not by the husband put in issue in the cause. III. 269

JUDGE AND JURY.

In case of an issue out of chancery, it is proper to move that court for a special jury. II. 68

Jury proper to try the reasonableness of a fine set on a copyhold estate. III. 157

Where the husband and wife part voluntarily, and a child is born during such separation, the child will be legitimate, unless the jury find the husband had no access. III. 275

Where a title depends on the words of a will, this is as properly determinable in equity, as by a judge and jury at *nisi prius*. III. 296
See also VERDICT.

JUDGMENT.

See SECURITIES.

Arrest of Judgment.

Where a special verdict has not certainly found any felony upon the facts therein stated, and consequently it is uncertain whether the prisoner be guilty of any felony at all, or only of a misdemeanor; or where the jury has found a general verdict, that the prisoner is guilty, and afterwards judgment is arrested for defects in the indictment, in these cases the judgment given must be judgment of acquittal: but this will be no bar to another indictment constituting a different offence. III. 499

JURISDICTION.

Where one is sued in an inferior court for a matter out of the jurisdiction, if in vacation time, a prohibition lies from the Court of Chancery, on affidavit that the matter is out of the jurisdiction: but no affidavit is necessary where on the face of the declaration the matter appears to be out of the jurisdiction. I. 476
By imparling generally the jurisdiction is admitted, and no foreign plea will be received afterwards. I. 477
The Lord Chancellor or Lord Keeper has jurisdiction in cases of idiocy or lunacy, not as Lord Chancellor or Lord Keeper, but by virtue of a royal sign manual; and from his orders or decrees touching these matters, no appeal lies to the house of Lords, but only to the King in council. III. 107, 108
See also the note thereto subjoined.
See also COURTS.

K.

KING.

See PREROGATIVE.

L.

LACHES.

Trustees not to take advantage of their own laches. I. 236
No laches to be imputed to a feme covert or infant. I. 718
A trustee forbearing to do what it was his office to have done, shall not prejudice the *cestui que trust*. III. 215

LAND-TAX.

See TAXES.

LAPSE OF TIME.

Lapse of time relieved against by a court of equity. II. 67

LEASES, AND COVENANTS THEREIN.

Lessee for years, though *sans* waste, cannot pull down a house, or trees which are a defence or ornament to the house. I. 528
Hard that lessee for years without waste should enjoy the trees or materials of the house when he pulls them down: the intention of that clause only being that the lessee for years should be as dispunishable as before the statute of *Gloucester*. *ibid.*
A college restrained by its constitution from leasing, except for twenty-one years, and at a rack-rent, makes orders, recommending it to their successors to renew at less than their rack-rent; this not favoured, as tending to a breach of the statutes. I. 655
Lessor covenanted to renew the lease at the request of the lessee within the term; lessee did not request, but his

executors do within the term; lessor is compellable to renew. II. 196

Lessor covenanted to renew the lease at the same rent, and upon the same covenants, as in the original lease. The renewed lease shall not contain the covenant of renewal. II. 197

A devise, that if *cestui que vie* of a church lease which the testator had, should die, the testator's executors should purchase the premises for the life of *J. S.*, the testator's kinsman: but if such purchase could not be made, then the surplus of the personal estate to go to another; the purchase was made accordingly; yet *J. S.* held to take no interest by this will. II. 323

A lease renewed by a guardian for an infant's benefit shall follow the nature of the original lease. III. 101

Lease of a coal mine to *A.* reserving a rent; *A.* the lessee declares himself a trustee for five several persons, to each a fifth. The five partners enter upon, work, and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent; the *cestui que trusts* not liable, but for the time during which they took the profits. III. 402

See also ESTATE FOR LIFE, AND ESTATE FOR YEARS.

LEASE AND RELEASE.

An estate for three lives is limited to *A.* and the heirs of his body; *A.* by lease, or by lease and release, may bar the heirs of his body as claiming under him, but cannot by any act bar *B.* *Quære tamen.* III. 265

LEGACY AND LEGATEE.

A child of a residuary legatee no witness to prove a will of a personal estate. I. 10

Where a legacy is given to a man, his executors and administrators, and the legatee dies in the life-time of the testator, the executor shall not have it; but a will that designs to prevent the lapsing of a legacy by the death of the legatee ought to be specially penned. I. 86

Father gives his son 40*l.* on condition that he does not disturb his trustees; on the trustees applying for an execution of the trust, the son decreed to join in the execution thereof, or else to forfeit his legacy. I. 136

Legacy given upon a man's dying without issue, to be paid within six months after his death; the man dies leaving issue, which issue within six months after died without issue; the legacy not due, it not being intended to arise upon any remoter contingency than that of a man's dying without issue living at his death. I. 198

Though the court, (generally speaking) marshals assets in favour of a legatee, as well as of a simple-contract creditor, yet a pecuniary legatee shall not be allowed to come in upon the land, in the place of a bond creditor, against the devisee of such land. I. 204, 679, 730

Payment to the father by an executor of a legacy given to a child held ill, though the testator by parol on his death-bed had directed it. I. 285

A residuary legatee, where there was a deficiency of assets, on the particular circumstances of the case, permitted to come *in pari passu* with the other legatees. I. 305

Devise to trustees and executors, as an encouragement to accept of the trust, of 100*l.* a-piece, 12*l.* for mourning and a ring, and 10*l. per ann.* a-piece for their trouble; one refuses, yet he shall have his mourning and ring, but not the 100*l.* legacy, nor the 10*l. per annum;* both which in such case shall not go to the acting executors, but sink in the estate. I. 334

Pecuniary legacies are given by the will, and afterwards greater legacies given to the same persons by the codicil; these no satisfaction for the legacies by the will, but the legatees to have both, because the codicil is part of the will; *a fortiori* if the legacies by the will and codicil are of different natures. I. 421, 423, 424

One gives legacies by his will, and other legacies by his codicil, charging his land with the legacies in the will only; on the personal estates not being suf-

ficient to pay all the legacies, the land shall bear the charge of the legacies by the will, and those given by the codicil be paid out of the personal estate. I. 422

Where the real estate was by will charged with the payment of the legacies *above-mentioned*, this was held not to extend to the legacies in the codicil; *secus*, had the land been charged with the payment of legacies generally. I. 423

A legatee's name very falsely spelt, referred to a Master to see who was intended. I. 425

Where the will was wrote blindly, and hardly legible, and the legacies in figures, the court referred it to a master to examine what those legacies were, and to be assisted by such as understood the art of writing. *ibid.*

One devises a legacy out of a fund which fails, whether and in what cases the legacy shall be paid out of the personal estate. I. 778

One having a wife and three daughters, devises 900*l.* to his three daughters equally payable at their respective ages of twenty-one or marriage, and if all die before their legacies are payable, then the whole to the mother; if two of the daughters die before their shares become due, the surviving daughter is entitled to the whole. II. 69

If a creditor by bond, or other creditor who may come upon the land, exhaust the personal estate, a legatee shall stand in his place and be paid out of the real assets. II. 81

Legatee's both Christian and surname mistaken, yet the legacy good. II. 141

One by will gives several legacies, *et inter al'*, to such of his creditors with whom he had formerly compounded their debts; this but a legacy, and not to be preferred to other legacies. II. 296

If I devise 100*l.* to *A.*, payable at his age of twenty-one, *A.* dies before twenty-one; his executors shall not have the legacy until such time as *A.* should have come to twenty-one if he had lived. II. 336

And my executor shall have the interest in the mean time. II. 478

But if I give a legacy to *A.*, payable at his age of twenty-one, and if he dies before, then to *B.*, and *A.* dies before twenty-one; *B.* shall have the legacy presently, and not stay till such time as *A.* should have come to twenty-one. *ibid.*

A. by will devises 500*l.* to his infant grandson, without appointing any time for payment, with proviso if he dies before twenty-one, then the legacy to go over to *B.*, the grandson shall have the interest of the legacy during his infancy. II. 504

The Court of Chancery in case of legacies determines according to the rules of the common, not of the civil law; as where I devise to my daughter 1000*l.* on condition that she marry with her mother's consent, with a devise over in case she does not marry with such consent; if the daughter marries without her mother's consent a court of equity determines the devise over and condition to be good, though the civil law says they are both void, and that *maritagium debet esse liberum*. II. 531

If a legacy be assented to by the executor, it from thenceforth becomes a legal property. *ibid.*

One gives a legacy to a daughter to be paid to her when she should attain twenty-one, or be married with the consent of his executors, proviso that if the daughter marries without the consent of the executors the legacy to go over; this condition, though general, must yet be understood if she marry under twenty-one without such consent, and on the daughter's coming to twenty-one, the court will decree her the legacy. II. 547

Where a legacy is devised of a leasehold estate to *A.* for life, remainder to *B.*, and the executor assents to the devise to *A.*, this is a good assent to the devise over. III. 12

A. by will declares his intention to dispose of his household goods by his codicil, and devises the residue of his personal estate not disposed of, nor reserved to be disposed of by his

codicil, to his wife, whom he made residuary legatee. Afterwards the testator makes a codicil, and does not dispose of the household goods thereby; the household goods shall not go to the residuary legatee, but according to the statute of Distribution. III. 40

Where an executor has an express legacy for his care and pains, though the next of kin has also an express legacy, yet the surplus shall go according to the statute of Distribution; especially if the surplus was intended to be disposed of. III. 43

A distributory share by the statute is in nature of a vested legacy transmissible to the representatives of the party entitled, even though he dies within the year. III. 49, 50 (N)

One gives a legacy of 200*l.* a-piece to his children, payable at twenty-one; and if any of them die before twenty-one, then the legacy given to him so dying to go over to the surviving children. One of the children dies in the life of the testator; though this legacy lapses as to the legatee dying under twenty one, yet it is well given over to the surviving children. III. 113

One devises the surplus of his personal estate to his four executors; this is a joint bequest, and on the death of one shall go to the survivors, as well in the case of a legacy as of a grant. III. 115

Interest recovered for a legacy, though after a receipt given in full for the legacy, and the principal legacy paid. III. 126

If a legacy be given out of land to *J. S.* payable at twenty-one, and *J. S.* dies before twenty-one, the legacy sinks. *Secus* where given out of a personal estate. III. 138

One by his will devises that all his debts and legacies shall be paid by his executors out of his personal estate, if that shall be sufficient; but if not, then that his executors shall *within twelve months* after his death mortgage so much of his real estate as shall suffice for that purpose, and *inter al'* gives a legacy of 1000*l.* to *J. S.*, who dies within a year, and the personal estate is not sufficient; this is a vested legacy, and shall be paid to the executor of the legatee, though charged upon land; for the words *within twelve months* denote the ultimate time; but the executors may pay the legacy sooner. III. 172

Husband and wife sue for a legacy given to the wife; the court will not compel the payment of it, unless the husband makes some settlement on the wife. III. 202

The court never allows an executor or trustee for his time and trouble, especially where there is an express legacy for his pains. III. 249

An executor in trust who had no legacy, and where the execution of the trust was likely to be attended with difficulty, at first refused, but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship, and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust money in their hands; but the court disallowed the demand. III. 251, 252 (N)

Legacy given out of a rent-charge shall carry interest. III. 254

A. having 500*l.* given him by his uncle, in case he should survive the testator's wife, sells it for 100*l.* to be paid by 5*l. per annum;* but that if the testator's wife should die before *A.*, and the legacy become due, in such case the rest of the money to be paid within a year then next. *A.* does survive the testator's wife, and knows the legacy was become due to him, and being fully apprised of the whole fact, confirms the bargain; he shall be bound thereby. III. 290

No necessity for making the residuary legatee a party. III. 311 (N)

On a devise of lands to pay debts, a legatee, whether specific or pecuniary, shall be paid out of the lands if the simple contract creditors have exhausted the personal estate. III. 323

One possessed of a term for 1000 years, articles to purchase the inheritance, and by will gives 3000*l.* to his daugh-

ter, making his son executor, and dies. The son assigns the term in trust to attend the inheritance, of which he takes a conveyance in his own name. Afterwards the son scknowledges a judgment to *A.*, and mortgages the same lands to *B.*, and dies insolvent; *A.* shall first be paid his judgment; then *B.* shall be paid his mortgage, and then the daughter (being administratrix to her brother) is entitled to her legacy of 3000*l.* in preference to the simple contract creditors. III. 328

Not usual for the Court of Chancery to require security of an executor for the due payment of legacies, until he has been guilty of some misbehaviour. III. 336

Neither has the spiritual court a power to exact security of an executor under pretence that, by reason of the bad circumstances of such executor, the legacies are in danger of being lost. III. 337 (N)

One devised the sum of 6000*l.* *South Sea* stock to *J. S.*, and the testator has but 5360*l.*, no more than the 5360*l.* shall pass; and the rest of the testator's personal estate not to be obliged to make it up 6000*l.*: but it might be otherwise if the testator had no stock at all. III. 384

Donatio causâ Mortis.

One by will disposes of his personal estate, and afterwards by parol gives 100*l.* bill to *A.* to deliver over to his nephew, if the testator should die of that sickness; such gift decreed good. I. 404

Husband upon his death-bed delivers to his wife a purse of 100 guineas, bidding her apply it to no other use than her own; this is a good legacy to the wife. I. 441

Not necessary to prove a gift which takes effect as *donatio causâ mortis* (though in nature of a legacy) with the will, it operating as a declaration of trust on the executor. *ibid.*

Husband on his death-bed draws a bill on his goldsmith, to pay to his wife 100*l.* for mourning; this a good appointment. I. 442, 443

In every *donatio causâ mortis* delivery must be made by the party, or by his order, in his last sickness; for which reason it cannot be of a bond or *chose en action*, which must be sued in the name of the executor; but it may be to a wife, being in nature of a legacy, but need not be proved with the will. III. 357, 358

Specific Legacies.

Money ordered by will, or articled to be laid out in land, or in an annuity, to be looked upon in equity as land, or an annuity, and as a specific legacy; consequently, on a deficiency of assets not to abate in proportion with the other legacies. I. 127

Vide autem, I. 539

So a legacy given to the wife in consideration that she release her dower on a deficiency of assets, shall not abate in proportion. I. 127

Specific legacy not to be broken into in order to make good a pecuniary one; much less shall pecuniary legatees, on a deficiency of assets, have any remedy for their legacies against a devisee of land; as where one seised in fee owes debts by bond, and devises land to his heir in tail, giving several legacies, and the heir, who was also executor, with the personal estate paid off the bond debts, by which means there was a deficiency of assets to pay the legacies; the legatees were held to be without remedy; otherwise had the land descended to such heir in fee. I. 201, 678

One seised in fee of some lands, and possessed by lease for years of other lands devises the fee to *A.* and the lease to *B.*, and dies indebted by bond; both these devises being specific, shall contribute equally to the payment of the bond debts. I. 403

Devise of a rent-charge out of a term, as much a specific devise as of the term itself. *ibid.*

Specific legacies on a deficiency of assets are not to abate in proportion. I. 422

A legacy of 1500*l.* to be laid out in land though to be taken as land, yet is not specific, but on a deficiency of assets shall abate in proportion. I. 539

A specific legacy is what vests by the consent of the executor; and as in some respects it has the advantage, so in others it has the disadvantage, of a pecuniary legacy. I. 540

Though *bona paraphernalia* be not to be allowed to the widow where there are not assets at the death of her husband, notwithstanding contingent assets afterwards fall in, yet under such circumstances she shall have a specific legacy. II. 79

One possessed of a term devises it to *A.*, and makes *B.* his executor, and dies leaving some debts; if the executor sells the term, the purchaser shall hold it against the devisee; *secus* if sold at an under value, or if the purchaser knew that there were no debts, or that the debts were or could be paid without breaking in upon this specific legacy. II. 148

If one owes debts by bond, and devises his lands to *J. S.* in fee, and leaves a specific legacy, and dies, and the bond creditor comes upon the specific legacy for payment of his debt; the specific legatee shall not stand in the place of the bond creditor, the devisee of the land being as much a specific devisee, as he who claims the specific legacy. III. 324

Specific legacies, as in some respects they have the advantage, so in others they have the disadvantage, of pecuniary legacies. III. 385

See also *Abatement*, and *Refunding of Legacies*.

Legacies or Portions, vested, lapsed, or extinguished.

A. devises to *B.*, his executors, administrators, and assigns, 400*l.*, which he owed *A.*, provided he thereout pays several particular sums to his children, the rest he freely gives him, directing his executors to deliver up the securities, and not to claim any part of the debt, but to give such release as *B.*, his executors, &c. shall require; *B.* dies in the life of the testator; decreed that so much of the 400*l.* as was to remain to *B.* was a lapsed legacy. I. 83

A will which designs to prevent the lapsing of a legacy by the death of the legatee in the life of testator ought to be specially penned. I. 86

One devises portions to his children, *A.*, *B.*, and *C.*, and if any die before 21 or marriage, the portion of the child so dying to go to the survivors or survivor; one of the children dies in the life of the testator; this not a lapsed legacy, but shall go to the surviving children. I. 274

An annuity is left by will to the testator's grand-daughter, but if she marries with the executor's consent, then a portion; the grand-daughter without consent of the executor marries a man worth nothing; the husband is not entitled to the money, the having married with consent, &c. being a condition precedent to the vesting of the portion. I. 284

One possessed of a personal estate devises, if his wife die without issue by him, that then 80*l.* shall be paid to his brother; the brother dies in the life of the wife, who afterwards dies without issue; decreed the legacy to be paid to the representatives of the brother. I. 563

A. devises the surplus of his personal estate to four equally, share and share alike, leaving *J. S.* executor in trust; one of the four dies in the life of the testator, his share is lapsed, and on the testator's death shall go according to the statute of Distribution. I. 700

A. amongst other legacies leaves 1000*l.* to his niece *B.*, at eighteen or marriage, and gives the residue of his personal estate to be laid out in land, and settled in strict settlement on *C.* for ninety-nine years, remainder to his first, &c. son in tail; afterwards *A.* by codicil devises that the 1000*l.* given by the will to his said niece should be made up 6000*l.* payable at twenty-one or marriage, the niece was eighteen at the time of the testator's making his codicil, and under twenty-one;—decreed she should have the interest of the 6000*l.* from the death of the testator, and that *C.* was only entitled to the *residuum*, exclusive of the 6000*l.* I. 783

A father gives a legacy to an infant child payable at twenty-one, in what case and in what manner the court will allow maintenance to the infant out of the legacy before it is due. II. 21

A. devises 500*l.* legacy to the second son of *J. S.*, and devises other legacies to the other sons of *I. S.*, declaring that if any of the younger sons of *J. S.* shall die before they are capable of receiving their shares, the share or legacy of him so dying should go to the survivor; the second son dies in the testator's lifetime, this 500*l.* given to the second son shall not survive. II. 330

A. having a niece, an infant about the age of seventeen, devises to her the surplus of his personal estate, payable at twenty-one, and if she die before twenty-one or marriage, then the surplus to go over; decreed the niece should have the interest paid her in the mean time, the devise over being a condition subsequent. II. 419

A. devises the surplus of his personal estate to six persons, to each a sixth part; one of them dies in the life of the testator; this sixth part shall be taken as undisposed of by the will, and go to the testator's next of kin. II. 489

Secus, had it been a joint devise, for then it should have gone to the surviving legatees. *ibid.*

By a marriage settlement a term for years is created to raise 5000*l.* for daughters payable at their age of twenty-one or marriage; proviso that if any of the daughters attain their age of twenty-one, or marry in the father's lifetime, then the portion to be paid within a year after the father's death; also if any of the daughters die before her portion is payable, or before her age of twenty-one, or marriage, her share to go to the survivors or survivor; there was issue a son and three daughters, the first of whom married and received her portion, the second attained twenty-one, married, and died without issue, and her husband administered; the third daughter survived both her sisters; resolved the husband, as administrator of the second daughter, was entitled to her share of the 5000*l.*, she having lived to twenty-one, so that the right vested in her, and the payment was only suspended till her father's death. II. 513

A legacy out of a personal estate, payable to an infant at twenty-one; if the infant dies before twenty-one, his administrators may have it; *secus*, if the legacy is charged upon a real estate. II. 610

Neither is there any diversity where a portion or legacy is charged by will upon land, and where by a deed payable to an infant at twenty-one; for in both cases where the infant dies before twenty-one, it sinks into land. *ibid.*

Abatement and Refunding of Legacies.

Charity legacies that are pecuniary shall, on a deficiency of assets, abate in proportion with other pecuniary legacies. I. 423

Whether a legacy of 200*l.* given by the testatrix for a monument for her mother ought on a deficiency of assets to abate in proportion. *ibid.*

As legatees are to abate in proportion, so if an executor pays one legatee, and there is not enough to pay all, the legatee who is paid shall refund in proportion; so if one legatee recovers his legacy in equity, and there is not enough to pay the rest, he shall refund; *secus*, if the deficiency of assets arises by the wasting of the executor. I. 495

One having two sons and a daughter, by will gives to each 2000*l.* payable at twenty-one, provided if assets fall short to pay the legacies, the abatement to be borne out of the son's legacy; the testator leaves assets to pay the whole, but the executor afterwards wastes; the daughter's legacy shall have the preference. I. 668

One by will gives several legacies, and afterwards in the same will, apprehending that there will be a surplus, therefore gives farther legacies; the legacies in the former part of the will shall have preference in case of a deficiency of assets. II. 23

One makes a will, then a codicil, and gives legacies by both; on a deficiency of assets they shall come into average. II. 23

In case of a deficiency, charity legacies as well as others shall abate in proportion; but a legacy of 3*l.* to the poor of the parish, to be taken as part of funerals, and so no abatement. II. 25

Sixty pounds' legacy to an executor for care and pains, in case of a deficiency to abate in proportion. *ibid.*

If an executor pays a legacy on a supposition that there are assets to pay all other legacies, and afterwards there is a deficiency, the legatee must refund. II. 447

See also SPECIFIC LEGACIES.

In what cases a Legacy shall or shall not be a Satisfaction of a Debt, or other Demand on the Testator's Estate.

A man has one daughter to whom 8000*l.* was secured by marriage settlement, and afterwards he gives her 8000*l.* by his will for her portion, and 200*l. per annum;* the daughter shall have but one 8000*l.*, though she may elect which of the portions she pleases. I. 147

Where a father is bound to give a portion with his child, and afterwards by his will gives a legacy to such child of as great or greater value than the portion, this is a satisfaction of the portion. I. 299

But a legacy is not to be taken in satisfaction of a debt upon an open account, where it is uncertain on which side the balance lies; nor in satisfaction of a debt contracted after the making the will. *ibid.*

One covenants to leave his wife 620*l.*, party dies intestate, and the wife's distributory share comes to more; this is a satisfaction. I. 324

One being indebted to his servant for wages in 100*l.*, gives her a bond for this 100*l.* as due for wages, and afterwards by will gives her 500*l.* for her long and faithful services; this is not a satisfaction for the bond. I. 408

Pecuniary legacies are given by the will, and afterwards greater legacies are given to the same persons by the codicil; these latter no satisfaction for the former, because the codicil is part of the will, especially where they are not *ejusdem generis.* I. 423

And see SATISFACTION.

Ademption of a Legacy.

Testatrix devised to her grandchild a debt of 4000*l.*, owing to her by *J. S.*, provided if any part of the debt should be paid in before the testatrix's death, then so much to be made good to the grandchild out of the surplus of the testatrix's estate; afterwards the testatrix released 2000*l.* of the said debt to *J. S.*, without having received any of the money; decreed that this was no ademption of the legacy *pro tanto*, but that the legatee or her representatives were entitled to the whole 4000*l.* as much as if the same had been paid in to the testatrix. I. 461

A fortiori if the testatrix had called in the debt, it would have been no ademption. I. 464

A father by will gives his daughter a portion of 500*l.*, and afterwards in his life-time gives her 300*l.* for her portion in marriage, and four years afterwards dies without revoking the will, the husband is a bankrupt; the assignees not entitled to the 500*l.* legacy, nor any part thereof. I. 681

One placed 500*l.* in a goldsmith's hands on his note, and aftewards orders part out again, and then devises 500*l.* in the goldsmith's hands to *J. S.*, this good for the whole 500*l.; secus*, if the testator had after the making the will drawn out part of this money; for this had been an ademption *pro tanto.* II. 164

A. having a debt due to him from *J. S.* devises 500*l.* of it to *B.*, and the residue of it to *C.*, but does not mention what the debt is which is owing from *J. S.* *A.* receives the whole debt in his life-time; *B.* dies before the testator; the testator's receiving in the debt in his own life-time is an ademption of the legacy, as to the devise of the *residuum* of the debt; but it might have been otherwise as to the certain

legacy given to *B.* if he had survived the testator. II. 330

One by will gives 100*l.* due to the testator for rent from *B.*, and now in *B.*'s hands; afterwards the testator sues *B.* for the rent, and recovers it; yet this no ademption of the legacy, since the testator's suing for it might be occasioned by his thinking the debt in danger. II. 469

Where a testator devises a debt, and afterwards receives it, or even calls it in, in neither case is this an ademption of the legacy. III. 386

Where and from what Time a Legacy shall carry Interest.

If a legacy be given out of land, it carries interest from the death of the testator, though no time of payment be mentioned in the will, because land yields profits. II. 26

If out of personal estate lying dead, it yields interest from a year after the testator's death; but if a time of payment be mentioned, then interest from that time. *ibid.*

If a legacy be given only out of a reversion or remainder, it shall not yield interest but from the end of the year. *ibid.*

If out of a personal estate consisting of mortgages or funds carrying interest, and no time be mentioned for payment, it shall carry interest from the death of the testator. II. 27

If a legacy be brought into court, the legatee shall lose the interest while it remains in court; but if placed out by the court at interest, legatee to have such interest. *ibid.*

A legatee or creditor coming in before a Master for his legacy or debt, and not party to the cause, shall have his costs; for it was in his power to have brought a bill for his legacy or debt, which would have put the estate to further charge. *ibid.*

Legacies given on Marriage with Consent, &c. See MARRIAGE, *Restraints on.*

Surplus. See title EXECUTOR, and *in what case he shall be only a Trustee for the Surplus.*

LEGISLATURE.

See PARLIAMENT.

LIEN.

Upon a settlement *A.* is made tenant for life, remainder to the heirs of his body by his wife; and in the same deed *A.* covenants not to suffer a recovery, but that the lands shall be enjoyed according to these limitations; *A.* does suffer a recovery, and devises the lands; the covenant good to bind the assets, but *A.* being tenant in tail, and as such having power to suffer a recovery, the lands devised shall not be affected. I. 104

One agrees for a valuable consideration to convey lands to *J. S.*, and afterwards confesses a judgment to *J. N.* if the consideration money paid by *J. S.* be any ways adequate to the value of the lands, it binds the lands in equity, and shall defeat the judgment; *secus* of a mortgage, or if the consideration were inadequate. I. 277

A. surrenders a copyhold by way of sale or mortgage, but the surrender is not presented, and *A.* becomes a bankrupt; this will bind the estate in equity. I. 280

One covenants before marriage to settle certain lands on his wife for life, and afterwards devises these lands for payment of debts, the covenant is a specific lien on the lands; *secus* of a covenant to settle lands of the value of 60*l. per annum*, without mentioning any lands in certain. I. 429

A. covenants on his marriage to lay out 3000*l.* in the purchase of land, and to settle it on himself in tail, remainder to *B.* *A.* purchases the manor of *B.* with this 3000*l.*, and never settles it, but suffers a recovery thereof. This covenant was a lien on the land, but the recovery suffered by *A.* discharged such lien, and barred *B.* of the benefit of it. III. 171

Where a man purchases an estate, pays part, and gives his bond for payment of the residue; notice of an equitable lien before payment of the residue,

though subsequent to giving the bond, is sufficient. III. 307

LIMITATIONS, STATUTE OF.

Where a bill in equity abates by death, if the executor or administrator will not revive within six years, it is within the statute of limitations; but if there be a decree to account, and the suit afterwards abates by death, and the executor does not revive within six years, this is not within the statute. I. 742

Feme covert having a separate estate borrows money on bond; the separate estate liable; and though six years pass, the demand not barred by the statute of limitations. II. 144

A trust not within the statute of limitations. II. 145, 374

One owing a debt by simple contract barred by the statute of limitations, devises lands in trust to pay his debts; *Qu.* whether this debt be revived by the will. II. 373

One owes a debt by simple contract. Six years pass, whereby the debt is barred; after which the debtor by will charges his lands with the payment of all his debts, and dies; it seems that by this the debt is revived. III. 84

Qu. If a man were to devise his personal estate in trust to pay his debts; would this revive a debt barred by the statute? III. 89 (N)

The statute of limitations no plea where the bill charges a fraud; but then it should be charged by the bill, that the fraud was discovered within six years before the bill filed. III. 143

So, though the assignee of the effects of a bankrupt claims under an act of Parliament; yet as the statute of limitations might be pleaded against the bankrupt, by the same reason it is pleadable against the assignee. III. 144

Length of time, which will not bar an ejectment, shall not bar a bill in equity. III. 287

Where it appears by a bill to redeem, that the mortgagee has been in possession twenty years, the defendant need not plead the length of time, but may demur; neither will a redemption in such case be allowed, unless on account of imprisonment, infancy, or coverture, or by having been beyond sea; and not by having absconded, which is an avoiding or retarding of justice. Also, as the court has not in general thought proper to exceed twenty years, where there was *no disability* in imitation of the first clause of the statute of limitations; so, *after the disability removed*, the time fixed for prosecuting, in the proviso, (which is ten years) ought in like manner to be observed. III. 287, 288 (N)

An executor, administrator, or trustee for an infant, neglects to sue within six years; the statute of limitations shall bind the infant. III. 309

A corporation (or company) shall have the benefit of the statute of limitations as well as any private person. III. 310

A fine and five years' non-claim shall, in favour of a purchaser, bar a trust term, though the *cestui que trust* be an infant. *ibid.* (N)

LIMITATIONS OF TERMS FOR YEARS.

See ESTATE *for Years.*

LOCAL.

See COUNTY.

LIS PENDENS.

See BILL.

ON, AND THE CUSTOMS THEREOF.

A. freeman of *London* purchases in the name of *B.*, who at the time of the purchase executes no declaration of trust; *A.* dies, after which *B.* gives a declaration of trust; this good against the custom. I. 321

Where a freeman of *London* leaves no wife, the children are entitled to one moiety of his personal estate, the

other moiety being the dead man's part. I. 341
Grandchildren of a freeman are not within the custom to come in for an orphanage part. *ibid.*
A freeman's son has had several sums from his father, the certainty whereof does appear, he has likewise had several other sums the certainty whereof does not appear otherwise than by the son's answer; these being all brought into hotchpot, the son shall come in for his orphanage part. I. 342
A jointure made by a freeman on his wife in bar of dower, will not bar her of the customary part, unless that be also expressly mentioned. I. 530
Land or money covenanted to be laid out in land, not within the custom of *London*. I. 532, 647
A freeman of *London* may at any time during his life, even in his last sickness, invest his personal estate in land, which will stand good, though the freeman shall have said he did this on purpose to defeat the custom. I. 532, 719
Where a freeman leaves his widow a legacy, and there is sufficient out of his testamentary part to pay the same, she shall have her legacy and customary part also. I. 533
On a freeman's widow's customary part being barred by composition, who shall have the benefit of it; whether the husband or children; also whether a child's orphanage part be barrable by a release or covenant for a valuable consideration. I. 634
On a child's releasing to his father his orphanage part, if the release be gained by threats or unduly, the same will be set aside in equity. I. 639
Leases given to a child by a freeman to be brought into hotchpot and valued. I. 642
One for a valuable consideration contracts to become a freeman of *London*, but dies before he has taken up his freedom; his personal estate shall be divided as if he had been a freeman, but his children not to be city orphans. I. 710
Though it may be a question whether the child of a freeman of *London*, upon receiving a suitable portion, may release to the father the orphanage part, yet if the child, or the husband of such child, covenants to release to the executors after the freeman's death; this good, and equity will execute the covenant. II. 272
Any lands of inheritance settled by a freeman on his child no advancement; *secus* of a lease for years; but if lands of inheritance are given as an advancement, and in bar of the custom, and accepted as such, this will bind in equity. II. 274
A father bequeaths to his younger daughter 3500*l.*; the son swears by his answer, that his father on his death-bed recommended it to him to let his sister have an annuity for her portion; the daughter has also a right to her orphanage part by the custom; the son being the father's executor, agrees with his sister, then forty years old, to give, and does settle an annuity of 250*l. per ann.* on his sister in lieu of her portion; the other sister is witness to the deed, and the agreement made by the consent of the relations; bill brought by the other sister's husband to set aside this agreement, dismissed with costs. *ibid.*
The personal estate of a freeman shall be applied to pay off mortgages preferably to the customary or orphanage part; so against a residuary legatee; but not against a pecuniary or specific legatee. II. 335
The statute of distribution is grounded on the custom of *London*. II. 358
A freeman of *London* having but one child advances that child in part only; the child shall take a full share without bringing what she had before received into hotchpot; for the only meaning of bringing the child's share into hotchpot is, to make an equality among the children. II. 526
If a freeman has several children, or but one child, and has in his life-time fully advanced that one child, or all his children, he may dispose of his estate as if there were none; so if the freeman compounds with his wife before marriage for her customary part, it is the same as if no wife. II. 527

If a freeman has advanced his child on marriage, and the certainty of that advancement does not appear under the freeman's hand, this is to be taken as a full advancement; but the freeman's declaration alone in his will that he has fully advanced his child, is not of itself sufficient evidence. II. 527

A freeman by his will gives 35*l.* to his daughter, provided that if she refuse to give a release, or put the executors to any trouble, then her legacy of 35*l.* to go over to her sister's children; the daughter claims her orphanage part, and the husband joins in the claim, and does not claim the 35*l.* legacy; decreed the daughter and her husband's claiming the orphanage part was a forfeiture, and that the 35*l.* being vested in the devisee over, equity will not devest it. II. 528

If the wife's portion be small, and the husband a freeman of *London*, the custom of *London* [alone] is a suitable provision. III. 13

A freeman of *London*, before marriage, settles some part of his personal estate on his intended wife, to take effect after his death, without mentioning it to be in bar of her customary part; this will bar her of such customary part. III. 15

It is sufficient if the custom of *London* be certified by the recorder at the bar *ore tenus*. III. 16

But if the certificate be false, an action lies against the mayor and aldermen, and not against the recorder; for it is their certificate by the recorder. III. 17 (N)

What alterations have been made, with regard to the custom of *London*, by 11 *Geo.* 1. *cap.* 18. III. 19 (N)

Where the husband was attainted of felony, and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate, as orphan to a freeman of *London;* this personal estate decreed to belong to the wife as to a feme sole. III. 37

One, not a freeman of *London*, married a city orphan; and though it did not appear that the party had any notice of his wife's being a city orphan; yet it was held such person was punishable by the court of orphans. III. 118 (N)

A freeman of *London* by his will charges his real estate with 1500*l.* for his daughter, and also gives her 1500*l.* out of his personal estate. The daughter would take the 1500*l.* out of the real estate (as that is not within the custom) and also claim her orphanage part. But the court, in regard the testator had disposed of all his real and personal estate among his children, and intended an equal division, would not suffer the child to disappoint her father's will, but compelled her to abide entirely by the will, or by the custom. III. 123

If a freeman gives a legacy to his child, and disposes of his whole personal estate, the child shall not have both the legacy and the orphanage part, even though the legacy does not exceed the dead man's part. *Secus*, if the legacy be given expressly out of the testamentary part: but in no case shall the child be obliged to make his election, till after the account taken. III. 124 (N)

Where a daughter of a freeman of *London* accepts of a legacy of 10,000*l.* left her by her father, who recommended it to her to release her right to her orphanage part, which she does release accordingly; if the orphanage part be much more than her legacy, though she was told she might elect which she pleased; yet if she did not know she had a right first to enquire into the value of the personal estate, and the *quantum* of her orphanage part, before she made her election; this is so material, that it may avoid her release. III. 316

Maintenance money, or an allowance made by a freeman to his son at the university, or in travelling, is not to be taken as any part of his advancement, this being only his education. III. 317 (N)

The will of a freeman cannot any way operate upon the orphanage part. III. 318 (N)

Though this seems to have been otherwise held formerly. *ibid.*

Freeman of *London* compounds with his wife for her customary part before marriage; it shall be taken as if no wife, and the husband shall have one half of the personal estate in his own power, the children the other half. III. 320

LORDS.

See PEERS OF THE REALM.

LUNATIC.

See IDIOT AND LUNATIC.

M.

MAINTENANCE FOR CHILDREN.

A. on his son's marriage settles lands on himself for life, remainder to the son for life, remainder to trustees for 1000 years for raising portions for daughters payable at twenty-one or marriage, with maintenance in the mean time, to commence the first quarter after the father's death; the father dies leaving one daughter, and the grandfather living: the bill prayed a mortgage of the reversion for the infant's maintenance, but the court strongly inclined against it. I. 488

In the court's allowing maintenance out of a Jew's estate to his daughter, turned Protestant, by virtue of 1 *Ann. cap.* 30., it is no objection that the daughter is above forty years of age, or married, or that the Jew is dead. I. 524

A father gives a legacy to an infant child payable at twenty-one; in what case and in what manner the court will allow maintenance to the infant out of the legacy before it is due. II. 21

Usual for the court, where younger children are left destitute, to make such a liberal allowance to the guardian of the eldest, as that he may thereout be enabled to maintain all the children. II. 22

So where a legacy has been devised over in case of the legatee's dying before twenty-one, the infant legatee has been allowed a maintenance out of the interest. II. 22

A reversionary term for raising maintenance and portions for daughters shall, in case of necessity, be mortgaged to pay either; and, when fallen into possession, shall pay all the arrears of maintenance incurred before it came into possession. II. 179

Maintenance money for a child not to be taken as an advancement. II. 449

By a marriage settlement maintenance for daughters is made payable half-yearly at *Lady-day* and *Michaelmas*, until the portions become payable, which is at eighteen or marriage; a daughter attained her age of eighteen the 16th of *August;* decreed to have her maintenance *pro ratâ* from the last *Lady-day*, till the time of her attaining eighteen. II. 501

Maintenance money, or an allowance made by a freeman to his son at the university, or in travelling, is not to be taken as any part of his advancement. III. 317 (N)

An allowance of maintenance to a guardian must be in regard to what the infant then had, not to what falls in afterwards. III. 368

See also PORTIONS.

MAINTENANCE, OR BUYING OF PRETENSED RIGHTS WITHIN 32 H. 8.

A defendant is not bound to answer what tends to accuse him of maintenance within this act. III. 375

A person interested in the premises (as a mortgagee) though he be no party to the suit, may expend money in supporting the title, without being guilty of maintenance. III. 378

MANDAMUS.

A *Mandamus* lies to the spiritual court to direct them to do right, as a prohibition does to stop them from doing wrong. I. 47

Whether error lies on a rule or award of a *mandamus*. I. 348

Writ of error on a judgment on a *mandamus* since the statute 9 *Ann.* no

supersedeas to a peremptory *mandamus*. I. 351

Where the spiritual court refused to grant the probate of a will to an executor until he should give security for a due administration of the assets, the court of *B. R.* has enforced the granting of such probate, by a peremptory *mandamus*. III. 337 (N)

MARRIAGE.

See BARON AND FEME.

Agreements on Marriage, and Underhand Agreements in Fraud of Marriage Agreements, see under AGREEMENT.

Marriage-Brocage Bonds.

Husband before marriage covenants to give a release to the wife's guardian of all accounts; this agreement set aside in equity, being within the same mischief as a marriage-brocage agreement. I. 118

A son on his marriage being to have 3000*l.* portion with his wife, privately, without notice of his parents who treated for the match, gives a bond to the wife's father to pay back 1000*l.* of the portion seven years afterwards; this bond void in equity, and will not be made better by being assigned to creditors. I. 496

Restraints on Marriage.

One by will leaves an annuity to his grand-daughter, but if she marries with the executor's consent, then a portion; the daughter without the consent, &c. marries a man worth nothing; the husband not entitled to the portion, the having married with the consent of the executor being a condition precedent to the vesting of the portion. I. 284

One devises the residue of his personal estate to *J. S.*, provided she marries with the consent of his two executors; on the death of one executor, the condition being a subsequent one is become impossible, and she may marry without the consent of the survivor. II. 626

Where there is a condition, that a feme shall marry with the consent of two executors, and one without reason is against the match, the court will dispense with his consent. II. 628

Devise of a legacy to a feme on condition she marry a man of the name of *Barlow*. *A.* takes upon him the name of *Barlow*, and the feme marries him; this is a performance of the condition, and equity will not decree the husband to retain that name. III. 65

All restraints on marriage held void by the ecclesiastical courts; and in the Court of Chancery relief is given against them in many cases, unless where there is a devise over. III. 238, 239

Licences for Marrying.

A parson obtains blank licences for marrying, under the seal of the proper officer, and afterwards fills them up; these are void notwithstanding. III. 118

MASTER AND SERVANT.

Father, on binding his son apprentice, gives bond in 1000*l.* for his son's fidelity; the son embezzles 200*l.* which the father pays, but desires the master not to trust his son any more with the cash; the master does trust the apprentice again with his cash, and is negligent in calling him to account; the son embezzles 1000*l.* more; the father is liable, but not to answer more in the whole than 1000*l.* including the first 200*l.* II. 288

MASTER'S REPORT.

Sufficient if a master's report is filed before any proceedings had thereon, though not within four days after it was made. II. 517

Not usual to have reports of receiver's accounts confirmed. II. 729

A father left a great personal estate to two infant children, and made his wife executrix. A bill was brought in the infant's name by a relation, as *prochein amy*, to call the mother to an account. On affidavit of several

other relations, that this suit in the infant's name was out of pique, and not for the infant's good, the court referred it to a master, who reporting the matter to be so, the suit was stayed. III. 140

A master's report, though it ought not to be conclusive, yet is, *prima facie*, to be looked upon as true, till falsified by an affidavit on the other side. III. 142 (N)

The defendant being a weak man, and about to be examined on interrogatories, the master himself was ordered to take his examination, lest he should unwarily admit something against himself that was not true. III. 289

MERGER.

See EXTINGUISHMENT.

MESSENGER.

See PROCESS.

MISPLEADING.

Court will not relieve on a matter purely of mispleading. II. 70

MINES.

One seised in fee conveys the lands, and all trees and mines, to trustees in fee, to the use of *A.* for life, remainders over; *A.* cannot open the mines or cut down the trees. II. 242

Tenant for life of coal-mines may open new pits or shafts for the working of the old vein of coals. II. 388

Hazardous to grant an injunction to stay the working of a coal mine. II. 389

One seised of lands wherein there are coal mines not opened, settles the premises on *A.* in tail, remainder to *B.* for life; *A.* opens the mines and works them and dies without issue; *B.* may continue working in all mines lawfully opened. *ibid.*

Lease of a coal mine to *A.* reserving a rent; *A.* the lessee declares himself a trustee for five persons, to each a fifth. The five partners enter upon, work and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent; the *cestuy que trusts* not liable, but for the time during which they took the profits. III. 402

MODUS.

See TITHES.

MONEY.

One by will made in *England* devises an annuity in trust for his wife out of lands in *Ireland*, the testator, his wife and the trustee residing in *England;* the annuity shall be paid in *England;* and in *English* money, and the estate bear the charge of the return. II. 88

So if one in *England* gives by will a legacy out of lands in *Ireland*, the legacy shall be paid in *England* and in *English* money. II. 89

Money has no ear-mark, and if invested in lands and other things, cannot be pursued; wherefore if a receiver of rents, or an executor in trust, lays out the rents or assets in a purchase of lands in fee, and dies insolvent, the purchase will not be liable; but if such receiver or executor in trust does by writing own that such purchase was made with the trust money; this is a sufficient declaration of trust to bind the estate. II. 415

If money be devised to an infant daughter, who marries, the court may refuse helping the husband to the money, unless he makes a suitable settlement. III. 12

Devise of my household goods and other goods to *A.*, the residue of my personal estate to *B.* The ready money and bonds do not pass by the word *goods.* III. 112

Difference between an award to pay money, and to do any thing collateral; and why a bill in equity may be proper only to compel a performance of the latter. III. 190

In a settlement a term was raised for daughters' portions, *viz.* 10,000*l.*, with a proviso, that if the father by deed or will should give any sum of money which should be actually paid to them, then such money, if equal, should be a satisfaction; if not equal,

then that it should go towards satisfaction of their portions. The father leaves land to the daughters to the value of 10,000*l.* This no satisfaction, in regard money and land going in a different channel, the one is not to be taken in satisfaction for the other. III. 245, 246, 247

One interested in the premises (as a mortgagee) though he be no party to the suit, may expend money in supporting the title, without being guilty of maintenance. III. 378

See more under title REAL AND PERSONAL ESTATE.

See also INTEREST OF MONEY, LEGACY, MORTGAGE.

Money agreed to be laid out in Land, see AGREEMENT; also *Matters controverted between the Heir and Executor*, under HEIR: see also ELECTION.

MORTGAGE.

Where money is agreed by articles to be laid out in land, the party who would have the sole interest in the land when bought, may (if of age) elect to have the money paid to him, and that it should not be laid out in land. I. 130, 389, 470

Husband borrows money, and he and his wife levy a fine of the wife's land as a mortgage for it, after which the husband by will gives legacies to charities to the amount of his personal estate; the mortgage shall be paid out of his personal assets, though the charitable legacies are lost thereby; but all the husband's debts, though by simple contract, shall be preferred to the mortgage. I. 264

Mortgage may be without a covenant or bond for payment of the money. I. 271

One agrees for a valuable consideration to convey lands to *J S.*, and afterwards makes a mortgage for a valuable consideration, and without notice; the mortgagee shall hold his mortgage against the intended purchaser; *secus* of a judgment creditor who has only a general security, and no specific lien upon the land. I. 277, 279

Mortgage in fee is made redeemable upon payment of 300*l.* and interest, upon any *Michaelmas*-day upon six months' notice; mortgagor dies, having devised his personal estate to his wife; personal estate liable to pay the mortgage. I. 291

A covenant to pay the mortgage money not suable in equity, unless the covenantor receives the money; as where a feme sole seised of land subject to a mortgage marries *B.*, who on an assignment of the mortgage covenants to pay the money, and dies; *B.*'s personal estate not liable in equity to pay it. I. 347

Where a first mortgagee is a witness to the second mortgage, though no actual proof of his knowing the contents thereof, yet since the presumption is, that he might have known the same, this shall postpone him. I. 394

Mortgagee of a ship by deed trusts the mortgagor with the original bill of sale, who indorses thereon subsequent mortgages or bills of sale, of several parts of the ship, and mortgagee acquiesces; this is evidence of an assent in such mortgagee, and shall postpone him. *ibid.*

Mortgagee shall not onerate his pledge with costs which he occasions by an unjust defence. I. 395

If there are not assets to pay all the legacies, a mortgagee, where the security is sufficient, shall not be paid out of the personal estate. I. 730, 731

A mortgage is a conditional sale; consequently, every power to sell implies a power to mortgage. III. 9

Tenant in tail of lands mortgaged not bound to keep down the interest, as tenant for life is. III. 235

Where there is a subsequent mortgagee without notice, who has possession of the title deeds, the first mortgagee shall not compel a delivery of the writings from him without paying him his mortgage money. III. 280

The first mortgagee permits the mortgagor to keep the title deeds, and the mortgagor shewing a fair title, mortgages the premises to a second mortgagee, to whom he delivers the deeds; the first mortgagee is accessary to the drawing in of the second. III. 281

In the pleading of a purchase or mortgage, the defendant must plead that the seller or mortgagor was, or pretended to be, seised in fee. III. 281

A bond or mortgage is, *prima facie*, good evidence of a debt: but in case fraud appears, the obligee, &c. ought to prove actual payment of the money. III. 289

Every mortgage, though without a covenant or bond to pay the money, implies a loan, and every loan implies a debt; therefore, an heir of a mortgagor shall compel an application of the personal estate to pay off a mortgage, notwithstanding there was no covenant, &c. from the mortgagor. III. 358

See also INTEREST.

As to the buying in of Incumbrances, and for whose Benefit it shall be, See TRUST, SECURITIES.

As to Concealment of Mortgages, See CONCEALMENT.

Special Agreement touching the Redemption of Mortgages.

One for 800*l.* consideration grants a rent-charge of 48*l. per ann.* in fee, upon condition, that if the grantor shall give notice, and pay in the 800*l.* by instalments, *viz.* 100*l.* at the end of every six months, and shall do this during his own lifetime, the grant to be void; the mortgage was made about 60 years since, when the legal interest of money was 8*l. per cent.*, and the mortgagor dead; decreed not redeemable. I. 268

In case of a mortgage, no clause can confine the equity of redemption to the lifetime of the mortgagor, or to him and the heirs male, or the heirs only of his body. I. 269

Redemption and Foreclosure.

Exchequer annuities mortgaged may be sold upon notice without a decree of foreclosure. I. 261

Mortgage of a rent redeemable at a greater distance of time than a mortgage of land. I. 270

Mortgage, though ever so old, is redeemable, if interest has been paid. I. 271

First mortgagee takes a release of the ultimate equity of redemption; this does not oblige him to pay off the intermediate mortgages, if he will waive the release. I. 395

One seized in fee mortgages to *A.*, and afterwards binds himself and his heirs by bond to *A.*, and dies; if the heir comes to redeem this mortgage, he must pay off the bond as well as the mortgage, but the assignee of the heir may redeem upon paying the mortgage only. I. 775

So, if one possessed of a term for years mortgages it to *A.*, and afterwards becomes indebted by simple contract to *A.* and dies, his executor shall not redeem the term without paying as well the note as the mortgage; *secus*, if any creditor of the testator brings his bill to redeem. I. 776, 777

A bill in equity will not lie to redeem a mortgage of chambers in the inns of court, but the plaintiff must apply to the bench, or to the judges of the society; *secus*, if on application to the bench they refer the plaintiff to his remedy in equity. II. 511

One possessed of a renewable term mortgages it to *J. S.*, who gains a new term from the original landlord, to commence after the old one; this new term shall be subject to the old equity of redemption. *ibid.*

Where it appears a mortgagee has been in possession twenty years, no redemption will be allowed, unless there be an excuse by reason of imprisonment, infancy, or coverture, or by having been beyond sea, (not by having absconded, which is an avoiding or retarding of justice;) and as the court of equity does not think proper to allow of a redemption after twenty years, where there is no disability, in imitation of the first clause of the statute of limitations, which after such a length of time bars an entry or ejectment; so it has been resolved, that after the disability re-

moved, the time fixed for prosecuting in the proviso (which is ten years) ought in like manner to be observed. III. 287, 288 (N)

In a bill brought to foreclose the equity of redemption, none need be made a party but the heir. III. 333 (N)

One possessed of a term for years, mortgages it, and dies, leaving debts by bond, and some by simple contract; the equity of redemption is equitable assets, and shall be liable to all the debts equally. III. 341

The equity of redemption of a mortgage comes to a feme covert, against whom and her husband a bill is brought to foreclose; the feme covert shall be foreclosed absolutely, and shall have no time to shew cause after the death of her husband. III. 352

In a foreclosure against an infant, though the infant has six months after he comes of age to shew cause, &c., yet he cannot ravel into the account, nor even redeem, but only shew an error in the decree. *ibid.*

An equity of redemption of a copyhold may be devised without being surrendered to the use of the will. III. 358

Tender of Money due on Mortgage.

As to a tender of mortgage money, there ought to be reasonable notice of paying it in; and if the tender be insisted on to stop interest, the money must be kept dead from that time, because the party is to be *uncore prist.* Six months' notice is given to pay in the mortgage money at *Lincoln's-Inn* Hall; though this be not the place mentioned in the proviso of the deed, yet where money was lent in town, and no objection made to the notice, no reason for a personal tender, or to make a man carry a great sum to a person in the country. II. 378

MULTIPLICITY OF SUITS PREVENTED BY EQUITY. III. 157, 334

N.

NAME.

Devise of a legacy to a feme on condition she marry a man of the name of *Barlow*. *A.* takes upon him the name of *Barlow*, and the feme marries him; this is a performance of the condition, and equity will not decree the husband to retain that name. III. 65

Anciently, people were called by their Christian names, and the places of their births; as *Thomas* of *D.*, &c. *ibid.*

One may of himself, and without an act of parliament, change his name, and take a new one. *ibid.*

NE EXEAT REGNUM.

See Writs.

NEW RIVER WATER.

Husband seised in right of his wife of a share in the *New River* Water; the wife cannot be barred without a fine, and where they both without a fine mortgage such share, the wife's paying interest after the husband's death will not affirm such mortgage. II. 127

NOMINATION TO AN ADVOWSON.

See Advowson.

NOMINATION TO A CHARITY.

See Charity.

NOTICE.

Where a first mortgagee who attests a second mortgage will be presumed to have had notice, see under title Mortgage.

The court cannot take notice of foreign laws and customs, unless they are proved. I. 431

Husband by marriage articles, in consideration of the marriage and of a portion, covenants to secure by a term,

out of particular lands, portions for daughters; there is issue by the marriage a daughter, and the wife dies, after which the husband on a second marriage settles part of these lands included in the term; such settlement, if without notice of the former articles, will take place thereof. II. 439

A purchase *pendente lite*, though without notice, and for a valuable consideration, yet shall be set aside. II. 482

There seems not to be the same reason for obliging people to take notice of the filing of a bill as of a decree. II. 483

Notice of motion given by one not allowed to act as solicitor, not good. III. 104

Marrying an infant ward of the court is a contempt, though the parties concerned in such marriage had no notice that the infant was a ward of the court. III. 116

Acts of the court, as the commitment of a wardship, and in a cause depending, to be taken notice of by every one at his peril. III. 117

One, not a freeman of *London*, married a city orphan; and though it did not appear the party had any notice of his wife's being a city orphan; yet it was held such person was punishable by the court of orphans. III. 118 (N)

A man founds a charity for alms-houses. The founder and his heirs may forfeit their right of nomination of the alms-people by a corrupt or improper nomination, or by making no nomination at all: but this neglect of nomination must be after such time as the founder, &c. have had notice of the vacancy, and without proof of such notice, it is no fault. III. 146 (N)

A commission being granted to examine witnesses at *Algiers*, the plaintiff died, by which, in strictness, the suit abated, but the witnesses were examined before notice of the plaintiff's death; the examination held regular, though one of the witnesses was yet living. III. 195

Witnesses examined in a commission after the demise of the crown, but before notice thereof, liable to be indicted for perjury, if they swear false. III. 196

See 1 Annæ, stat. 1. cap. 8. sect. 5.

In a plea of a purchase, it is a sufficient denial of notice to say, that at the time of the purchase he had no notice, without saying, or at any time before. III. 243

And in all cases of a plea of a purchase, or marriage settlement, notice must be denied, though not charged by the bill; and it is sufficient to deny it either in the plea or answer; however, it is best to deny notice in both. III. 244 (N)

Where a man purchases an estate, pays part, and gives bond to pay the residue of the money; notice of an equitable incumbrance before payment of the money, though, after the bond, is sufficient to affect him. III. 307

In all indictments against one for being accessary after the fact, by receiving, harbouring, &c. a felon, it is necessary to charge that the defendant knew the principal was guilty, or convicted of felony: and the omission of this necessary ingredient is not to be helped by the finding of the verdict; especially if the verdict does not find the fact of notice, but only what is evidence thereof. III. 493

An outlawry or attainder in a particular county may, as the case may happen to be circumstanced, be some evidence to a jury of notice to an accessary in the same county; but cannot with any reason or justice create an absolute presumption of notice, so as to excuse the not charging the fact to be done *sciens* or *scienter* in the indictment. III. 496

See also MORTGAGE, *Tender of Money due thereon.*

O.

OATH.

A Peer of the realm is to put in his

answer upon honour: but his examination on interrogatories, or as a witness, must be upon oath. I. 146
Where the suit was frivolous, a Quaker defendant was allowed to put in his answer without oath or affirmation. I. 781
On time given to answer, a defendant may put in a plea; for that is as an answer, and on oath. III. 81
And see AFFIDAVIT.

OBLIGATION.

See BOND.

OCCUPANT.

A. by will devises lands to trustees and their heirs, in trust to divide the profits equally between his wife and daughter (the heir of the testator) during the wife's life, and after her death he devises the same to the use of his daughter in tail, with remainders over; the daughter dies without issue and intestate during the mother's life; resolved that the mother and daughter were tenants in common, and that the mother should have a moiety of the profits during her life, and that the other moiety by the statute of Frauds and Perjuries should go to the executors, &c. of the daughter, as before that statute it would have been liable to occupancy, and not to the heir of the testator, as profits undisposed of and resulting to him. I. 34
A church lease for three lives is granted to a bastard and his heirs, who dies without issue and intestate; shall this lease go to the administrator of the bastard, or to the crown, or is the lessor intitled, or is it *casus omissus* out of the act of Frauds and Perjuries, and so remains liable to occupancy at common law? III. 33, 34 (N)
An estate *pur autre vie* is distributable in equity, though not in the spiritual court. III. 102
See also the 14 Geo. 2., whereby this kind of estate being undevised, or in part applied to the payment of debts, according to the statute of Frauds, shall be distributed in the same manner as personal estate. III. 102 (N)
An estate *pur autre vie* may be limited to *A.* in tail, remainder to *B.* For this is only a description who shall take as special occupants during the life of *cestui que vie.* III. 262
What objection lies against such remainder being good. III. 263 (N)
At law, and before the statute of Frauds, there could be no general occupant of a rent; but since that statute, a rent granted generally to *A.* for the life of *B.*, shall on *A.*'s death, living *B.*, go to the executors or administrators of the grantee, during the life of the *cestui que vie.* III. 264 (N)
An estate for three lives is limited to *A.* and the heirs of his body, remainder to *B.* *A.* by lease and release may bar the heirs of his body as claiming under him, but cannot by any act bar *B.* III. 265
Quære tamen.
And see the case of the Duke of *Grafton* v. *Hanmer.* III. 266 (N)
Lands are given to *A.* and his heirs for three lives. *A.* dies: his heir does not take by descent, so as to have his age, or to make the parol demur, but takes as special occupant. III. 368

OFFER.

An offer made during a treaty which afterwards breaks off, or upon terms which are not accepted, not binding. I. 497

OFFICE AND OFFICER.

Appointment by deed of particular annuities to be paid out of an office, countermandable. I. 101
Where the suitor has paid the officer his fee, and he neglects his duty, by which the suitor's process becomes irregular, the suitor is to pay the costs to the other side, but shall recover them again from the officer. II. 657
And though the officer in such case dies, his executor will be ordered to pay the costs out of assets, it being matter of contract, and therefore not dying with the person. *ibid.*

A parson obtains blank licences for marrying, under the seal of the proper officer, and afterwards fills them up; these are void notwithstanding. III. 118

A. by his interest with the commissioners of excise, gets an office in that branch of the revenue for *B.*, who in consideration thereof gives a bond to *A.*, to pay him 10*l. per ann.* so long as *B.* enjoys the office; equity will relieve against such bond. III. 391

Though the excise was no part of the revenue at the time of making the statute of 5 & 6 of *Ed.* 6. [concerning the sale of offices;] yet there may be good ground to construe it within the equity and reason of that statute. III. 393

ORIGINAL.

After judgment in an action on a policy of insurance, if error be brought to reverse such judgment for want of an original, the court will not permit the party to file an original, in regard if this judgment were reversed, the plaintiff may begin a new action; *secus*, were it in a *quare impedit*, or in an action against the hundred for a robbery, where the suit must be commenced within a limited time; or had the time been so far elapsed, as that the statute of limitations had been a bar if the judgment should be reversed. I. 412

The plaintiff recovered judgment in an action at law, but by means of the illness of his attorney, who had been disordered in his head, an original was omitted to be filed, and for want thereof a writ of error brought; upon affidavit of this, the court gave leave upon paying the costs of the writ of error, to file an original. I. 412, 413

Instructions for an original against an hundred for a robbery were brought to the cursitor within the year, but the writ passed the great seal after the year, though tested within the year, *viz.* when the instructions were brought; this held good, being warranted by the practice of the cursitor's office. I. 437

And see WRITS.

ORPHAN.

See LONDON.

OUTLAWRY.

A. having outlawed *B.*, brings a bill against *B.*, and likewise against *C.*, a trustee for *B.* with respect to an annuity, to subject this annuity to the plaintiff's debt; the Attorney-general ought to be made a party, and the plaintiff must get a lease or grant in the Court of Exchequer from the Crown. I. 445

Where an executor in trust was outlawed, and a witness proved that he had inquired after, and could not find him; held not necessary to make him a party. I. 684

Debt against the sheriff for an escape of one in execution on an outlawry after judgment, may be brought either in the *tam quam*, or at the suit of the party only. I. 687

A. is indebted to *B.*, who outlaws *A.*, and *C.* having goods of *A.* in his hands, *B.* brings a bill against *C.* to discover what goods of *A. C.* has; *C.* may demur, for that *B.* makes no title to the goods, as having no grant from the crown; also for that the Attorney-general ought to be made a party. II. 269

In an indictment against one as accessary after the fact to a felony, by receiving, harbouring, &c. a felon, who was outlawed or attainted in the same county, it ought to appear that the party receiving did it *sciens* or *scienter;* for though an outlawry or attainder in a particular county may, as the case may happen to be circumstanced, be some evidence to a jury, of notice to an accessary in the same county, yet it cannot with any reason or justice create an absolute presumption of notice. III. 496

P.

PAPIST.

Where a Papist is disabled to take land, how far equity will help the next

Protestant heir to take advantage of his disability. I. 353

By the statute of 11 & 12 *W.* 3. against the growth of Popery, a Papist under eighteen is disabled to take only till conformity; if above eighteen, disabled for ever. I. 354

By the statute of 11 & 12 *W.* 3. c. 4. a Papist is disabled not only from purchasing lands himself, but also from taking lands either by devise or settlement, the word *purchase* being used in contradistinction to the word *descent*. II. 3, 361

So if lands are devised to be sold in trust in the first place to pay debts and legacies, and to pay the surplus to *J. S.*, a Papist; *J. S.* is rendered incapable of taking the surplus, forasmuch as it is a profit arising out of land; and such devisee, by laying down the money, may prevent the sale. II. 5

A Papist conforming at eighteen incapable of taking lands devised to him under that age. *Quære.* II. 6

Secus, where at the time of the devise such person is so young as not to be able to choose or understand any religion. II. 6, 135

Devise of lands to trustees in trust, if the eldest son of *A.* turn Protestant, then to such eldest son; this a good devise, not to a Papist, but to a Protestant. II. 132

Devise to *A.*, a Protestant for life, remainder to *B.*, a Papist for life, remainder to *C.*, a Protestant; *A.* dies, *B.* being a Papist is disabled to take, and *C.* shall take presently in the same manner as if the remainder had been to a monk. II. 362

Devise of lands to *A.* for life, remainder to *B.* a Papist for life, remainder to trustees for the life of *B.*, in trust to let *B.* take the profits, and to preserve the contingent remainders; the trust to let *B.* the Papist take the profits is void, but the trust to preserve the contingent remainders good; and in this case the grantor and his heirs being Protestants shall have the profits during the life of the Papist, after whose death they shall go to *B.*'s son, being a Protestant. *ibid.*

If a Papist was above the age of eighteen and six months when the statute of 11 & 12 *W.* 3. against Papists was made, he is out of the former clause of that statute. II. 364

A Papist cannot take a freehold or leasehold by will, because taking by will is taking by purchase; and by the express words of the *stat.* 11 & 12 *W.* 3. *cap.* 4. a Papist is disabled to take by purchase. Also terms for years are expressly mentioned in the statute. III. 46

Where a judgment was given to a Papist, it was determined that he could not extend the land; for that would give him an interest in the land, contrary to the express words of the statute abovementioned; and it is the same thing where the judgment is given in trust for the Papist. *ibid.* (N)

A Papist may, if above eighteen and a half, take lands by descent; also he may take a personal estate (as a lease for years) by the statute of distribution. III. 48

Qu. If a Papist be not capable of taking as tenant by the curtesy or tenant in dower, these estates being cast on them by act of law? III. 49 (N)

PARAPHERNALIA.

One dies indebted by bond more than all his personal assets can pay; the widow shall have her *bona paraphernalia*, provided there be real assets to satisfy the bond. I. 729

Bona paraphernalia not devisable any more than heir-looms. I. 730

Bona paraphernalia not to be allowed to the widow where there are not assets at the death of her husband, though contingent assets afterwards fall in; *secus*, of a specific legacy. II 79

Liable only in favour of creditors, not of the heir, nor consequently of a devisee who stands in the place of the heir. II. 544

PARDON.

A general act of pardon, though with an exception of all offences and con-

tempts prosecuted at the charge of any private person or persons, yet held to pardon a contempt in marrying a ward of a court of equity. I. 696

Where the husband was attainted of felony, and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate as orphan to a freeman of *London;* this personal estate decreed to belong to a wife as to a feme sole. III. 37

By the 18th of *Eliz.* actual burning in the hand, as well as the allowance of clergy, was necessary to [pardon or] discharge the prisoner from the felony; and therefore, if before 4 *Geo.* 1. *cap.* 11. an offender, after clergy allowed, had escaped before he had been burnt in the hand, he would have continued a felon, and a stranger, by assisting him to escape, or unlawfully receiving, harbouring, &c. might have become accessary to his felony after the fact. III. 487

See also title CLERGY, and *how and from what time Burning in the Hand by* 18 *Eliz., and Transportation by* 4 *Geo.* 1. *c.* 11., *are to be looked on as Statute Pardons.*

PARLIAMENT.

Act of Parliament.

Banishment cannot be but by act of Parliament. III. 38

No necessity for an act of Parliament to change one's name. III. 65

And see STATUTES.

Privilege of Parliament.

Suing the bail below, pending a writ of error in Parliament, is a contempt and breach of privilege. I. 685

PAROL AGREEMENT.

See AGREEMENT, PAROL.

PAROL DEMUR.

In the case of lands in fee descending to an infant, the parol shall demur in equity, as well as at law; but if lands are given to *A.* and his heirs for three lives; here the parol shall not demur during the infancy of the heir, who doth not take by descent, but only as special occupant. III. 368

PAROL EVIDENCE.

See EVIDENCE.

PARSON.

The parson is a corporation for taking of lands for the benefit of the church, as the churchwardens are for personal things. II. 126

A parson obtains blank licences for marrying, under the seal of the proper officer, and afterwards fills them up; these are void notwithstanding. III. 118

PARTIES.

One seised of lands in fee binds himself and his heirs in a bond, and devises his lands to *J. S.* in fee, and dies; in a bill brought by the obligee in the bond to subject the devisee to the payment of the debts, the devisor's heir must be made a party. I. 99

Where a bill wants proper parties, it is in the power of the court to dismiss the bill *sans* prejudice, or to give leave to amend, paying costs. I. 428

A. having outlawed *B.* brings a bill against *B.*, and likewise against *C.*, a trustee for *B.*, with respect to an annuity, to subject this annuity to the plaintiff's debt; the Attorney-general ought to be made a party. I. 445

In a suit on behalf of a charity for the arrears of a rent charge, not necessary to make all the ter-tenants of the land out of which the rent issues parties. I. 599

They only are parties to a bill against whom process is prayed. I. 593

Where an executor in trust was outlawed, and the witness proved that he had inquired after, and could not find him, held not necessary to make him a party. I. 684

A. is indebted to *B.*, who outlaws *A.*, and *C.* having goods of *A.*'s in his hands, *B.* brings a bill against *C.* to discover what these goods are; the

Attorney-general ought to be a party. II. 269

One devises that his executors should sell his lands, and leaves two executors one whereof dies, and the other renounces, and administration is granted to *A.*, who brings a bill against the heir to compel a sale; whether the renouncing executor, in whom the power of sale collateral to the executorship was vested, ought not to be made a party. II. 308

Two obligors in a bond bound jointly and severally, and one dies, the executors of the deceased obligor may be sued in equity for the debt, without making the surviving obligor a party. II. 313

An old mortgage is made to *B.* for 350*l.*, who in 1705 makes an under-mortgage to *C.* for 300*l.* *C.* brings a bill to foreclose; *B.*, the original mortgagee, or in case of his death his representatives, ought to be made parties. II. 643

One having a bastard, leaves a personal estate to her executor in trust for the bastard, who dies intestate, and without wife or issue. The executor brings a bill against one who has part of this personal estate in his hands; he need not make the Attorney-general a party. III. 33

In a devise of lands to pay debts, if the creditors bring a bill to compel a sale, the heir is, generally, to be made a party; *secus*, in case of a trust by deed to pay debts. III. 92

A., tenant for years, remainder to *B.* for life, remainder to *C.* in fee. *A.* is doing waste; *B.* though he cannot bring waste, as not having the inheritance, yet is entitled to an injunction; but not unless the reversioner or remainder-man in fee be made a party. III. 268 (N)

A general rule, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. Thus a residuary legatee need not be made a party; neither in a bill brought by the creditors of a bankrupt against the assignees under the commission, need the bankrupt himself be made a party. III. 311 (N)

However, in a bill brought for a discovery of some entries and orders of the *East India* company, the secretary and book-keeper of the company being made defendants, their demurrer was over-ruled, lest there should be a failure of justice. III. 310

A. covenants for himself and his heirs, that a jointure house shall remain to the uses in the settlement. The jointress brings a bill against the heir for a performance; though at law the creditor may sue the heir only, where the heir is expressly bound, yet as the personal estate is the natural fund to pay all debts, and as the executor may make it appear that he has performed the covenant, the executor must be made a party in equity. III. 331

In a bill brought by a mortgagee against the heir of a mortgagor to foreclose, the executor of the mortgagor need not be made a party. III. 333 (N)

In a bill for an account of the personal estate of *J. S.*, though the person who has a right to administer to *J. S.* be a party, yet this is not sufficient without administration actually taken out. III. 349

PARTITION.

On a partition in chancery every part of the estate need not be divided, but sufficient if each tenant in common, &c. has an equal share of the whole. I. 446

On a bill to settle the boundaries of a manor, it was decreed that each party should give to the other a note of their boundaries, in order to have the matter tried in a feigned issue; and the issue being found for the defendant on three trials, he was not only allowed the costs of all the trials at law, but also those in equity; in regard the defendant had no bill, and the plaintiff might have tried it at law, without coming into equity. II. 376

On a bill of partition no costs of either side, because it is for the benefit of both parties. *ibid.*

Lands are conveyed in trust, as to one moiety to *A.*, an infant in tail, as to the other to *B.*, who is of age in tail; *A.* the infant brings a bill for a partition; whereupon the court decreed a partition, but that the trustees should not convey till the infant was of age, that he might join in confirming the partition. II. 518

A. and *B.* tenants in common of lands in fee. *A.* by will, dated 25 *January*, 1719, devised his moiety in fee. Afterwards *A.* and *B.* made partition by deed, dated 16 *May*, 1722, and fine, declaring the use as to one moiety in severalty to *A.* in fee, and as to the other moiety in severalty to *B.* in fee; this deed of partition and fine no revocation of the will of *A.* III. 169, 170 (N)

PARTNERS.

A. and *B.* partners in a goldsmith's trade are bound in a bond to *J. S.* *A.* and *B.* break off the partnership and divide their stock: *J. S.* the obligee in the bond, knows this, and that *A.* took upon him to pay the debts, and after a great distance of time brings a bill against the executor of *B.*; yet he *(J. S.)* shall recover. I. 682

It is a resolution of convenience, that in case of joint traders becoming bankrupts, the joint creditors shall be paid out of the partnership effects, and the separate creditors out of the separate effects; and if any surplus of the partnership effects, after all the partnership debts paid, the separate creditors to come in; and so *vice versâ* the partnership creditors to come in on a surplus of the separate estate. II. 500

Two joint traders becoming bankrupts, first there is a joint commission, and the commissioners assign; afterwards separate commissions and assignments under them; the court held that the assignment under the first commission conveyed all the bankrupt's estate, both joint and several, and consequently that the conveyance under the separate commission was void. II. 500

Five persons purchased *West Thorock* level from the commissioners of sewers, and the purchase was to them as joint tenants in fee; but they contributed rateably to the purchase, which was with an intent to drain the level; after which several of them died; they were held to be tenants in common in equity; and though one of these five undertakers deserted the partnership for thirty years, yet he was let in afterwards, and upon what terms. III. 158

A. and *B.* are partners in trade. *A.* gives a bond to leave his wife 1000*l.* *A.* dies, the other partner administers; if the wife would be paid out of the separate estate of *A.* on there being effects, she shall have a preference before other creditors; but if there be no separate effects, and the wife would have satisfaction out of the partnership effects, then all the partnership debts must be first paid. III. 182

Lease of a coal-mine to *A.* reserving a rent; *A.* the lessee declares himself a trustee for five persons, to each a fifth. The five partners enter upon, work, and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent; the *cestui que trusts* not liable, but from the time during which they took the profits. III. 402

See more of *Partners and Partnership*, under tit. BANKRUPTS.

PATRONAGE.

See PRESENTATION.

PAYMENT.

Stoppage no payment at law nor in equity, unless under special circumstances, and in case of mutual demands, where the balance only is the debt. II. 128

A receipt indorsed signed by the seller for the purchase money, if the money be not really paid, is of no avail. II. 295

No bill will lie for a tenant to be relieved out of the arrears of rent, for the taxes the tenant has actually paid on account of rent reserved to a charity, which appears to be exempt from taxes. III. 128 (N)

So where land was mortgaged for securing an annual payment of 20*l.* to a widow in satisfaction of her dower; this annual payment being secured out of land, ought to answer taxes as the land does; but if the tenant in his payment of the annuity to the widow omits to deduct for taxes, he shall not make her refund in equity. *ibid.*

A bond or mortgage is, *primâ facie*, a good evidence of a debt: but in case fraud appears, the obligee, &c. ought to prove actual payment. III. 289

Where a man purchases an estate, pays part, and gives bond for payment of the residue of the money; notice of an equitable incumbrance, before payment of the money, though after giving the bond, is sufficient. III. 307

General Payment, how it shall be applied.

In a bill to compel a performance of an agreement to transfer *York Buildings* stock, the bill alleged, that the plaintiff paid 6*d.* as earnest, and the plea said the defendant did not receive or accept it as earnest; the plea ill, it not being material how or in what manner the defendant received or accepted it, but how the other paid it; for *quicquid solvitur solvitur ad modum solventis*. II. 308

One has a son and three daughters, and is seised of some lands in fee, and of others in tail, and by his will devises his fee-simple lands to his daughters, and dies, leaving all his children infants. His widow takes the profits of both estates as guardian to her children; and in a bill brought by the son and daughters against the mother, for an account of the personal estate, and of the rents and profits of the real estate, the mother swears that she has paid bond debts due from the testator out of the entailed estate, and afterwards dies insolvent; as the answer cannot be read against the daughters, and there is no other evidence, and since the guardian ought to have paid the bonds only out of the fee-simple estate, payment shall be intended to have been made out of that fund which ought to have borne it. III. 365

Presumption of payment of money on a bond after twenty years, and no interest received during that time, and how such presumption has been taken off. III. 396, 397 (N)

Payment of a Legacy.

See LEGACY.

Payment of Portions.

See PORTIONS.

Payment of Debts, Trust for.

See TRUST.

PEER.

A peer of the realm is to put in his answer upon honour: but his answer to interrogatories and examination as a witness must be upon oath. I. 146

First process of contempt against a menial servant of a peer is a sequestration *nisi*, as against the peer himself. I. 535

Since the union, a *Scotch* peer made an *English* peer cannot by virtue thereof sit and vote in parliament. I. 582

A peerage granted to an infant cannot be waived by him when he comes of age. I. 586

Whether the Crown may create one a peer against his will. I. 592

A peer disinherited by his ancestor is entitled to the favour of the court, and on bill and answer, to have the family deeds brought before the Master, in order to see whether any thing can be discovered to his advantage. II. 177

Ingratitude to the crown for a peer to devise away the estate from the honour. II. 178

A sequestration *nisi* is the first process against a peer or member of the house

of commons: but if there be a sequestration *nisi* against a peer for want of an answer, and the peer puts in an answer which is insufficient, yet the order for a sequestration shall not be absolute, but a new sequestration *nisi* shall issue. II. 385

No appeal lies to the house of peers from an order or decree of the Lord Chancellor or Lord Keeper, touching lunatics. III. 108

Peers exempted from being burnt in the hand in the case of clergyable felonies. III. 455

PERJURY.

Witnesses examined in a commission after the demise of the crown, but before notice thereof, liable to be indicted for perjury, if they swear false. III. 196

See 1 Annæ, stat. 1. cap. 8. sect. 5.

In a plea of a purchase it is a sufficient denial of notice for a defendant to say, that at the time of the purchase he had no notice, without saying, or at any time before; and the party, if it appears that he had notice before, will be liable to be convicted of perjury. III. 244

A corporation aggregate, or company, can answer only under their common seal; and though they answer never so falsely, there is no remedy against them for perjury. III. 311

PERPETUITY.

Devise of lands to a corporation, in trust to convey the premises to the testator's godson *A.* for life, and so to his first son for life, and afterwards to the first son of that first son for life, and in default or failure of such issue of *A.* to convey them to *B.* for life, &c. this is a perpetuity: but the conveyance shall be made as near the intent of the party as the rules of law will admit, (*viz.*) by making all the persons in being tenants for life only, but the limitation to the sons unborn must be in tail. I. 332

A perpetuity defined. II. 688

And see *Limitations of Terms for Years*, under title ESTATES.

PERSONAL ESTATE.

One devises all his money in the government funds to be laid out in the purchase of land to be settled on the eldest son of *A.* and the heirs male of his body, remainder over, and devises the rest of his personal estate to be settled in the same manner; the personal estate cannot be entailed, but the whole vests in the eldest son. I. 290

One devises lands to trustees in fee, in trust to apply the profits thereof until sale for the benefit of all his four children, and the survivors and survivor of them equally, and on farther trust, that as soon as the trustees shall see necessary they shall sell the premises, and apply the money for the benefit of his four children equally, to be paid at twenty-one or marriage; *A.*, the eldest of the four children attains twenty-one, marries, dies without issue intestate, and leaving a wife; decreed that the lands being in all events devised to be sold, though the time for sale was left to the executors, was personal estate, and *A.*'s widow must have a moiety of his share, and that the profits of the land until sale must go as the money arising upon sale would. II. 320

An estate for three lives granted to *A.*, his executors and administrators, is a personal estate, and will on *A.*'s death be liable to his debts by simple contract, as a lease for years would be. II. 381

A freeman of *London*, before marriage, settles some part of his personal estate upon his intended wife, to take effect after his death, without mentioning it to be in bar of her customary part; this will bar her of such customary part. III. 15

Alterations made by 11 *Geo.* 1. *cap.* 18. with regard to allowing freemen of *London* unmarried, and not having issue by any former marriage, to dispose of their personal estate. III. 19, 20 (N)

A bastard dies without issue and intestate; the king is entitled to his personal estate, and the ordinary will grant administration thereof to the

patentee or grantee of the crown. III. 33

A Papist may take a personal estate by the statute of Distribution. III. 48

If a man were to devise his personal estate in trust to pay his debts, *Qu.* If this would revive a debt barred by the statute of Limitations? III. 89 (N)

An executor or other trustee cannot change the nature of the testator's or *cestui que trust's* estate by turning money into land, or a lease for years into a freehold, *et e converso.* III. 100

Legacy or portion is given out of a personal estate to *J. S.* payable at twenty-one, and *J. S.* dies before twenty-one, yet the legacy, &c. will go to his executors. III. 138

Personal estate purchased after making a will, shall yet pass by the will. III. 171

Money articled to be laid out in land, and settled on husband and wife and issue, remainder in fee to the husband, may, on there being no issue, be devised (subject to the wife's estate for life) by the husband as personal estate, and by a will not attested by three witnesses, provided it appears the husband intended it should pass as such. III. 221, 222 (N)

Though a freehold cannot be in abeyance, yet a personal estate may be kept in suspense, in order to wait till a future contingency happens. III. 305

Express words, or words tantamount, are requisite to exempt a personal estate from the payment of debts. III. 325

Though at law a creditor may sue the heir only, where the heir is expressly bound; yet as the personal estate is the natural fund for payment of debts, the representative thereof (*viz.* the executor) must be made a party in equity. III. 331

In a bill brought by a mortgagee to foreclose an equity of redemption, there is no need to make the representative of the personal estate a party, or to run into any account thereof. III. 333 (N)

Where the Personal Estate shall be applied to exonerate the Real, see Real Estate.

PIN-MONEY.

See Baron and Feme.

PLACE-BROCAGE BOND.

See Office.

PLAINTIFF.

The Court cannot make an order to examine a plaintiff *de bene esse*, as they will to examine a defendant; and if the plaintiff is an immaterial one, the defendant ought to have demurred to him. I. 595

PLANTATIONS.

When an application is made for a sequestration to the foreign plantations, it ought to be to the king in council, II. 262

So an appeal from decrees made in the plantations lies only to the king in council. *ibid.*

PLATE.

By what Words it shall pass. See Exposition of Words.

PLEA.

A plea upon the statute of 4 & 5 *Annæ*, *cap.* 17. in relation to bankrupts must conclude to the country, and not to the court. I. 258

By imparling generally the jurisdiction is admitted, and no foreign plea will be received afterwards. I. 477

On a suggestion of gross fraud, the court will upon an original bill over-rule a plea of a decree and a report made and confirmed thereon, if the suggestion of fraud be not denied. II. 73

Where the defendant insists on the benefit of the statute of limitations by way of answer, he shall at the hearing have the like benefit as if he had pleaded it. II. 145

On time given to answer, a defendant

may put in a plea, for that is as an answer, and on oath. II. 464
A defendant cannot demur and plead to the same part of a bill; for the plea over-rules the demurrer. III. 80
On time given to answer, a defendant may put in a plea, for that is an answer, and on oath. III. 81
A defendant, in his plea of a purchase for a valuable consideration, omits to deny notice; if the plaintiff replies to it, all the defendant has to do is to prove his plea; and it is not material if the plaintiff proves notice; for it was the plaintiff's own fault that he did not set down the plea to be argued, in which case it would have been over-ruled. III. 94
The statute of limitations no plea where the bill charges a fraud: but then it should be charged by the bill, that the fraud was discovered within six years before the bill filed. III. 143
In the case of the *South-Sea* company, in whom the estates of the late directors are vested by act of parliament; where the statute of limitations might have been pleaded against the late directors, it is pleaded against the company, who stand but in such directors' place. *ibid.*
So where, the assignee of the effects of a bankrupt claims under the act of parliament; yet as the statute of limitations might be pleaded against the bankrupt it is by the same reason pleadable against such assignee. III. 144
When a plea is ordered to stand for an answer, it must be intended a sufficient answer, so that the plaintiff cannot except to it. III. 239, 240
In the plea of a purchase, it is a sufficient denial of notice to say, that at the time of the purchase he had no notice, without saying, or at any time before. III. 243
In a plea of a purchase or marriage settlement, notice must be denied, though not charged by the bill; and it may be denied either by the plea or answer, but it is best to deny it by both. III. 244 (N)
A precedent where a reconciliation by the husband, after the wife's going away with the adulterer, is specially pleaded, and the plea allowed. III. 273 (N)
In the pleading of a purchase or mortgage, the defendant must plead that the sellor or mortgagor was, or pretended to be, seised in fee. III. 281
If to a bill the defendant answers as to matter of discovery, and pleads only as to relief, the plaintiff may except to any matter of discovery before the plea argued. III. 327 (N)
If the defendant's time for answering be out, the court will notwithstanding order proceedings to be revived, unless cause be shewn either by plea or demurrer; its appearing by answer will not be sufficient. III. 348
After a plea put in, there can be no motion for an injunction, till the plea is argued. III. 396
And see REPLICATION.

POOR.

A bequest to one's *poor* relations how construed. I. 327
See EXPOSITION OF WORDS.
Liberty of the *Rolls* in *Middlesex* is within the parish of *St. Dunstan's* in the *West*, *London*, and contributes a fifth towards the repairs of the said church: but having distinct overseers, and maintaining its poor separately, is not entitled to a share of the charities given by will or deed to the poor of *St. Dunstan's*, though entitled to a fifth of all collections made at the church-door or at sacraments. I. 669
Before the statute of 43 *Eliz.* no such officers as overseers of the poor. I. 670
In a poor cause, and where the matter is clear, to save expense, the court will refer it to the register, instead of the master, to compute the interest or arrears of rent. III. 258
And see CHARITY.

PORTIONS OR PROVISIONS FOR CHILDREN.

A man has one daughter to whom 8000*l.* is secured by marriage settle-

ment, and afterwards he gives her 8000*l.* by his will for her portion, and 200*l.* *per annum;* though the daughter when of age may elect which portion she pleases, yet she shall have but one 8000*l.* I. 147

The eldest daughter, where there is a son, or where the estate by a settlement goes all to a remainder-man, is as a younger child in equity, and as such entitled to a share of the provision appointed for younger children. I. 244, 451

Where a father is bound to give a portion with his child, and afterwards by his will gives a legacy to such child of as great or greater value than the portion; this shall be taken in satisfaction of the portion. I. 299

In a term raised to secure a daughter's portion, the trusts were declared, that if the husband should leave no heir male by the marriage, and should leave a daughter or daughters, then the trustees were to raise portions payable to daughters at twenty-one or marriage; provided that if the husband should die without leaving a daughter living at his death, then the term to cease; there is no issue male by the marriage, but there is a daughter who attains twenty-one and marries; the mother dies, and the daughter also dies in the father's lifetime, leaving issue, her husband administers to her, he shall have no portion. I. 401

Trust of a term to raise portions out of rents and profits, to be paid as soon as conveniently might be; by virtue of the word *profits* trustees may sell or mortgage; *secus*, if said *annual* profits. I. 415

Provision for children *to be begotten*, shall extend to children *already begotten*. I. 426

Term created for daughters' portions, commencing after the death of the father and mother, upon trust to raise the portions *from and after the commencement of the term;* father dies leaving a daughter; decreed the portion is vested, but not raisable during the life of the mother. I. 448

Father by will gives a portion of 500*l.*, and afterwards in his lifetime gives her 300*l.* for her portion in marriage, and four years afterwards dies without revoking the will; the husband is a bankrupt; the assignees not entitled to the 500*l.* legacy, nor any part thereof. I. 681

A reversionary term decreed (though *reluctante curia)* to be sold for raising a daughter's portion. I. 707

One has several daughters, and being seised in fee charges his lands with 1000*l.* a-piece to his daughters, payable at twenty-two or marriage, and if any die, then to the survivors, but no time limited when the additional portion shall be paid to the surviving daughters; if one dies unmarried before twenty-two, the additional portion shall not be paid to the surviving daughters until the deceased daughter should have come to twenty-two. II. 271

If I secure a portion to a child by deed payable at twenty-one, out of land, and the child dies before twenty-one, the portion shall sink into the land, and not go to the executors; so if I devise a portion to a child out of land, payable at twenty-one, and the child dies before twenty-one, the portion shall sink; also it shall sink as well for the benefit of the *hæres factus* as of the *hæres natus;* so though the money given to the child be not said to be for a portion, if it appears to be so in fact. If by the will the portion be given out of the real and personal estate, payable to the child at twenty-one, and the child dies before that time, then so much as will arise out of the personal estate shall go to the executors or administrators, but what would arise out of the land must sink. II. 276

Where there is a proviso in a will, that in case what is left to one daughter shall exceed in value what is given to another, the former shall refund *pro tanto;* what is given to any of the daughter's children is to be looked upon as given to the daughter herself. II. 343

Husband by marriage settlement secures a portion for daughters of the marriage in default of issue male; there is one daughter only; the husband survives

that wife, marries again, leaves issue by his second wife, and dies intestate, the daughter by the first marriage being an infant, and her portion not then due; if the daughter lives till the portion is due, it is an advancement *pro tanto*, and must be brought into hotchpot as to the other issue. II. 435

Portions secured by settlement out of land, or articled so to be, are not to be paid out of the personal estate. II. 437

Provision for a child by a father by will not to be brought into hotchpot, nor a provision of land for an heir. II. 440

Usual at the time of making the statute of distribution to provide for children by settlement; for which reason a provision by settlement is to be taken as an advancement *pro tanto*. II. 448

If money be devised to an infant daughter who marries, the court may refuse helping the husband to the money unless he makes a suitable settlement. III. 12

Though if the portion be small, and the husband a freeman of *London*, the custom of *London* is a suitable provision. III. 13

Where lands are charged with portions, and no time appointed for payment, the right to the portions vests immediately. III. 120

A portion is secured out of land, and the daughter dies before the portion becomes payable; the portion sinks. III. 138

In all cases where a husband makes a settlement of his own estate on his wife, in consideration of her fortune; the wife's portion, though consisting of *choses en action*, is looked on as purchased by him, and will go to his executor. III. 199(N)

See also MAINTENANCE; *Legacies or Portions vested*, under title LEGACY; *Trusts raising Portions and Payment of Debts*, under title TRUST.

POSSIBILITY.

Whether a possibility be not assignable by the commissioners of bankruptcy. I. 385

A. devises a term for years to *B.* for life, remainder to *C.*, who in the life of *B.* devises his remainder to *D.*, this is a good devise, though of a possibility, and amounts in equity to a declaration by will, that *C.*'s executors shall stand possessed of the term in trust for the devisee. I. 572

Two article, that whatever *J. S.* shall by his will leave to either of them should be equally divided betwixt both; such agreement good, and shall be carried into execution by this court; also if after this one of them contrives that *J. S.* shall leave part of his estate to a third person in trust for him, this is within the articles. II. 182

Possibility is assignable in equity for a valuable consideration. II. 608

A contingent interest or possibility in a bankrupt is assignable by the commissioners. III. 132

Term of 1000 years to secure daughters' portions, payable at sixteen years of age; provided, if no daughter at the time of failure of issue male, the portion to sink. There is a daughter who attains to sixteen, and marries without consent, and no son by the marriage: but the daughter dies in the lifetime of the father and mother, and consequently when there was a possibility of their having a son; the portion sinks. III. 134

See an objection against an estate *pur autre vie* being limited over after an estate tail, on account of such remainders being only a possibility. III. 263 (N)

Testator devised a term for years and all his personal estate to *A.* an infant, and if *A.* died during his infancy, and his mother should die without any other child, then to *B.* *A.* died during his infancy; though the mother was living, and might have a child, yet the court aided *B.*, the devisee over, by directing an account and discovery of the estate, in order to secure it, in case the contingency should happen. III. 300

See also *Limitations of Terms for Years*, under ESTATE FOR YEARS.

POSTHUMOUS.

Where there is a power to charge lands for portions for younger children

living at the father's death, a posthumous child is within that power. I. 245

One devises the surplus of his estate to his children and grandchildren *living at his death*; a child or grandchild *en ventre sa mere* at the testator's death will take. I. 342

One devises, in case he leaves no son at the time of his death, to *J. S.*; the testator dies leaving his wife *privement ensient* with a son; this posthumous son is a child living at the testator's death, and *J. S.* not entitled. I. 486

POWER.

Where tenant in tail has a power to make leases, this not void, being intended to enable him to bind the reversion or remainder without fine or recovery, which power he has not by 32 H. 8. I. 144

Devise to *A.*, (the testator's wife) for life, and then to be at her disposal, provided it be to any of his children, gives her an estate for life, with a power to dispose of the fee; and where such devisee with an after-taken husband did, by lease, and release, and fine, convey the premises to a trustee and his heirs, to the use of herself for life, without impeachment of waste, remainder to her daughter by her first husband, and the heirs of her body, remainder to the son by her first husband, and his heirs; this adjudged a good execution of the power. I. 149

Power to charge lands for portions for younger children living at the testator's death; a child *en ventre sa mere* is a child within the power. I. 245

Where lands are settled on *A.* for life, remainder to such woman as he shall marry for life, remainder over, with power for him to charge the premises with any sum of money; such power, unless there be a clause inserted to the contrary, will, like a power of leasing, over-reach all the estates. I. 246

A settlement is directed to be made on *A.* with a power to make a jointure of a moiety; *A.* before the settlement, makes a jointure of what exceeds a moiety; the court will take no notice of this during the husband's life, for it may never take effect. I. 604

Where there is a power to appoint an use of land by deed or will, a will attested by two witnesses not a good appointment, it being to be intended such a will as is proper to dispose of land. I. 741

So though it be by any writing in nature of a will. *ibid.*

Tenant for ninety-nine years, if he so long live, with power of charging the premises with sums of money, joins in suffering a recovery, and in declaring new uses thereof; this extinguishes the power of charging. I. 777

Diversity betwixt a power annexed to an estate, and one collateral thereto, the first passing with the estate, the other not. I. 778

In what cases Equity will help a Defective Execution of a Power.

Tenant for life with power to make a jointure, remainder over, tenant for life covenants to make a jointure to a wife in consideration of marriage by virtue of his power or otherwise, of 500*l. per annum*, and dies before making the jointure: equity will make it good. II. 222

Husband having a power to make a jointure to his wife by deed, does it by will, and she has no other provision; equity will make this good. II. 489

Being only a defective execution of a power; *secus*, of a non-execution. II. 490

Baron and feme seised in fee in right of the feme, by deed and fine settled the premises to the use of the baron and feme for their lives, remainder to their first, &c. son in tail, remainder to the daughters in tail, remainder to the husband and wife and their heirs, with power to the baron during the joint lives of him and his wife, by his last will, or any writing purporting to be his last will under hand and seal, attested by three witnesses, if baron dies before his wife, to charge the premises with 2000*l.* The like power, *mutatis mutandis*, to the wife,

if she die first, to charge the premises with the like sum; husband by will under his hand, attested by three witnesses, but not sealed, charged the premises with 2000*l.*; held void, being without a seal. II. 506

Equity aids a defective execution of a power, if for a valuable consideration; and this against a remainder-man, or one not claiming under the power. II. 623

Tenant for life, with power to make a jointure of 100*l. per annum* for every 1000*l.* which he has with his wife, covenants on marriage to make a jointure accordingly, and also to make an additional jointure on receiving or becoming entitled to any further money in right of the wife; after the death of the husband, the wife becomes entitled to an additional fortune; she shall not compel the remainder-man to make an additional jointure on her on this account; but on the other hand the husband's creditors shall not take from the wife this additional fortune. II. 648

Power of Revocation.

See Revocation.

PREROGATIVE OF THE CROWN.

In prosecutions of the crown, though since the late statute of the 4 and 5 *Annæ*, the *venire facias* which was awarded *de vicineto*, and not *de corpore comitatus*, was held good. I. 223

On the crown's bringing a *scire facias* to repeal a charter, the defendant shall pay costs on a new trial. I. 224

A *chose en action* may be assigned to the king, and he or his grantee sue for it in their own name. I. 252

The king may reserve a rent out of things incorporeal, and may distrain for this rent on any other lands of the tenant, but not on such lands of the tenant as are let out by him or extended. I. 307

An appeal lies from a decree in the *Isle of Man* to the king in council, to prevent a failure of justice; although in the grant made of that island by the crown there may have been no reservation of the king's right to determine on such appeals. I. 329

Whether the king has power to make a man a peer against his will. I. 592

Upon an outlawry, the crown is not a trustee for the plaintiff, but it is merely *ex gratiâ* that a grant is made of the goods of the person outlawed to the plaintiff in satisfaction of his debt. I. 690

When an application is made for a sequestration to the foreign plantations, it ought to be to the king in council. II. 262

So an appeal from a decree made in the plantations lies only to the king in council. *ibid.*

A. is indebted to *B.*, who outlaws *A.*, and *C.* having goods of *A.'s* in his hands, *B.* brings a bill against *C.* for a discovery thereof; he ought first to have a grant of these goods from the crown which is not *de jure*, but *ex gratiâ*. II. 269, 270

A bastard dies without wife or issue, and intestate; the king is entitled to his personal estate, and the ordinary of course grants administration to the patentee or grantee of the crown. III. 33

Qu. If a church-lease for three lives be granted to a bastard and his heirs, who dies without issue and intestate, shall the crown be entitled thereto, or what shall become of it? III. 33, 34 (N)

No appeal lies from an order or decree of the Lord Chancellor, or Lord Keeper, in cases of idiocy or lunacy, but only to the King in council. III. 108

The Lord Chancellor, &c. having jurisdiction therein, not as Chancellor, &c. but by virtue of a royal sign manual. *ibid.* (N)

The king's grant of the estate of a lunatic without account is void; but the king, or the Lord Chancellor, &c. may allow such a yearly maintenance to a lunatic, as amounts to the yearly value of the lunatic's estate. III. 110

The writ of *ne exeat regnum* formerly

a state writ, and made use of only by the crown. III. 313
The king's courts ought not to give away the revenue of the crown upon original writs; nor, consequently, to order the filing an original to make good a judgment on error brought, without some excuse for not filing one before. III. 314

PRESENTATION TO A CHURCH OR CHAPEL.

The building and endowing of a church originally entitled one to the patronage. I. 774
The impropriator of a parish has no right to nominate a preacher to every chapel within the parish, much less is he compellable so to do. *ibid.*
One may build a private chapel for himself and neighbours, or for himself and twenty neighbours; and this will not give the parson a right to nominate a preacher there. (1) *ibid.*
If an advowson only be mortgaged, and becomes void, it seems the mortgagee is to present, especially if in the deed the agreement be that he shall present; but where one mortgages a manor with an advowson appendant, and the church becomes void, the mortgagee, though in possession, shall not present until the mortgage is foreclosed. II. 404
Mortgagee of an advowson presents; the bill brought by the mortgagor must be within six months, in the same manner as a *quare impedit.* II. 405
An advowson descending to an heir is real assets, and, as it seems, extendible in an *elegit.* III. 401

PRINCIPAL AND ACCESSARY.

One may be an accessary to a felony after the fact, by assisting a felon convict, being in custody under sentence of transportation, to escape out of prison. III. 485
In all indictments against one for being accessary after the fact, by receiving, &c. a felon, it is necessary to shew that the defendant knew the principal was guilty, or convicted of felony. III. 493
See also ACCESSARY.

PRISON AND IMPRISONMENT.

One taken on a *supplicavit*, and continued in prison a year without any fresh threatening, ought to be discharged. III. 103
Reasonable that a sequestration should lie in case one taken by process of chancery continues in prison without paying his debts. III. 241
In an indictment for an offence of breaking a prison, it is necessary to lay an actual breaking. III. 484
In an indictment for rescuing a prisoner, the word *rescussit*, or something equivalent, must be used, to shew it was forcible, and against the will of the keeper. *ibid.*
One may be accessary to a felony after the fact, by assisting a felon convict, being in custody under sentence of transportation to escape out of prison. III. 485
And see FLEET PRISON.

PRIVILEGE.

If an ambassador's servant brings a bill, he must give security to answer costs, as being a person privileged. II. 452
The father has an undoubted right to the guardianship of his own children; and, if he can any way gain them, is at liberty so to do, but must not take them in going to, or returning from the court. III. 154, 155
And see PARLIAMENT.

PROBATE.

See WILL.

PROCESS.

If the party's clerk in court be dead, no process can be taken out against the

(1) But the decision in the principal case was, that the impropriators should nominate the ministers of the chapel.

party until he has appointed a new clerk in court, for which purpose a *subpœna ad faciend' attorn'* must be taken out, the leaving of which at the house of the party is good service. I. 420

A. being beyond sea sues *B.* at law, who brings a bill in equity against *A.*; the court will order that service on the defendant's attorney at law shall be good service, but not that such attorney shall put in his answer without oath. *Qu.* if the defendant was in an enemy's country where no commission could go to take the answer. I. 523

They only are defendants to a bill against whom process is prayed. I. 593

Subpœna.

Where an infant is defendant, the service of the *subpœna* to hear judgment must be on the guardian, not on the infant. II. 643

Attachment.

The attachments on which an order for a serjeant at arms is grounded must be entered in the register's office, else it is irregular. II. 657

The court of Chancery sends attachments to the warden of the Fleet. III. 55

The sheriff is the proper person to execute process: but where he is party, or otherwise incapacitated, it must be directed to the coroner. *ibid.*

Sequestration.

Whether a grantee of a fee-farm rent may distrain for the same upon lands under sequestration. I. 307

First process of contempt against a menial servant of a peer of the realm is a sequestration *nisi*, as against the peer himself. I. 535

The court of Chancery in *England* may grant a sequestration against the defendant in *Ireland*; but it must be after a sequestration taken out here, and *nulla bona* returned. II. 261

When an application is made for a sequestration to the foreign plantations, it ought to be to the king in council. II. 262

Where the sheriff has the amerciaments, as in *London*, the course was to grant a messenger to bring in the body on a *cepi corpus* returned; but now the practice is to deny a messenger, and order the sheriff to bring in the body, else the sheriff to pay the plaintiff all the costs. II. 301

A sequestration *nisi* is the first process against a peer, or member of the house of commons: but if there be a sequestration *nisi* against a peer for want of an answer, and the peer puts in an answer which is insufficient, yet the order for a sequestration shall not be absolute, but a new sequestration *nisi* shall issue. II. 385

Latterly the practice has been, that if the defendant appears to a bill, and stands out in contempt to a sequestration, the cause is set down to be heard, and the record of the bill produced, and taken *pro confesso*; but if time be given to a defendant to answer, though after sequestration, and though the answer be reported insufficient, yet the bill shall not be taken *pro confesso.* II. 556

The only way upon a decree for a debt to affect land, is to proceed for a contempt to a sequestration; but such sequestration abates by the death of the party, which an extent does not. II. 621

In chancery, not only the body of the defendant, but also his lands and goods, are liable to a sequestration; but no sequestration lies, till the time for the return of the attachment is out, on which the body was taken. III. 240

Reasonable that a sequestration should lie, in case one taken by process of chancery continues in prison without paying his debts. III. 241

When lands are decreed, the manner of gaining possession is, first to serve the party with a writ of execution of the decree, then to have an attachment for a contempt in not obeying the decree, and afterwards an injunction to deliver possession of the premises; and if that is not done, to have a writ of assistance to the sheriff; but when a receiver is appointed, this

being as it were the hand of the court, he will in a summary way be put in possession, and the tenants ordered to attorn to him, and a writ of assistance granted, without awarding an injunction, which is the usual preceding process. III. 379 (N)
And see CONTEMPT.

PROCHEIN AMY.

See INFANT.

PROCURATIONS.

Procurations are due of common right for the bishop, or his vicar the archdeacon's instructing the clergy, and properly demandable of the curate, in case of an impropriation, in the ecclesiastical court. I. 657

PRODUCTION OF BOOKS, &c.

A defendant referring to books, &c. by his answer, makes them as part of his answer, and shall therefore produce them for the inspection of the plaintiff. I. 774

PROFITS.

See TRUST *for raising Daughter's Portions.*

PROHIBITION.

In vacation-time, on the spiritual or other court's exceeding their jurisdiction, the Court of Chancery will grant a prohibition. I. 43, 476

PROOF.

See EVIDENCE.

PROPORTION.

Where there was tenant for life, remainder to an infant in tail, remainder to tenant for life in fee, the court would not value the life estate at more than one-third. I. 650
And see AVERAGE.

PUBLICATION.

After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses, in order to falsify the defendant's examination. III. 413

PURCHASE.

As distinguished from Descent.

See HEIR.

PURCHASE, PURCHASER, AND PURCHASE-MONEY.

On casualties happening between the articles for a purchase and the sealing of the conveyance, who shall bear the loss. I. 61
In marriage articles the issue to be considered as purchasers. I. 145, 291
A purchaser before a master submitting to lose his deposit, is not bound to proceed in the purchase. I. 745
One seised in fee devises lands to his granddaughter for life, remainder to his right heirs male for ever, and dies, leaving his granddaughter his heir at law, and a deceased brother's son his next heir male; the devise of the remainder is void, it being necessary that he who claims as heir male by purchase, must be heir as well as heir male. II. 1
By the statute of 11 and 12 *W. 3. cap.* 4. a Papist is disabled not only from purchasing lands himself, but also from taking lands either by devise or settlement, the word *purchase* being used in contradistinction to the word *descent.* II. 3
One possessed of a term devises it to *A.*, and makes *B.* his executor and dies, leaving some debts; if the executor sells the term, the purchaser shall hold it against the devisee; *secus*, if sold at an under-value, or if the purchaser knew that there were no debts, or that the debts were or could be paid without breaking in upon this specific legacy. II. 148
The court will not compel a purchaser under a decree to accept a doubtful title. II. 201
A receipt indorsed signed by the seller for the purchase money, if the mo-

ney be not really paid, is of no avail. II. 295

A reversion expectant on an estate for life is decreed to be sold; *B.* is confirmed the best purchaser, and the order made absolute the 1st of *January* 1724; on the —— day of *January* 1726, *B.* is ordered to bring his money into the bank; the life drops; as, if the life had dropped the next day after the report of *B.'s* being the best purchaser made absolute, the purchase must have stood, and as from that time the life was wearing, so from that time the purchaser ought to pay interest. II. 410

A widow of a freeman of *London*, who left children and died intestate, was entitled to four-ninths of his personal estate, and having by deed assigned over her four-ninths for her separate use in case of marriage, to such persons as she should appoint, and for want of such appointment, then to her children; the widow intending to marry a second husband, by another deed, to which the husband was party, in consideration of the intended marriage, and of a settlement made on her by him, recites, that if she did not dispose of her four-ninths, the husband would be entitled thereto; and then assigns it over to trustees, in trust for the intended husband during their joint lives, subject to her control and disposal by writing, after which she dies without disposing of it; decreed the second husband is as a purchaser, and the recital, that he would be entitled to it if the wife should not dispose of it, was a gift. II. 533

A Papist is by 11 and 12 *W.* 3. *cap.* 4. disabled to take by purchase, which has been construed to extend to taking by will. III. 46

A defendant in his plea of a purchase for a valuable consideration omits to deny notice; if the plaintiff replies to it, all the defendant has to do is to prove his purchase. III. 94

One articles to buy land, and the title is under a will not proved in equity against the heir; yet in some cases equity will compel the purchaser to accept the title. III. 190

In all cases where the husband makes a settlement of his own estate on his wife, in consideration of her fortune; the wife's portion, though consisting of *choses en action*, and though there be no particular agreement for that purpose, is looked upon as purchased by him. III. 199 (N)

30,000*l.* is covenanted to be laid out in land; the money need not be laid out all together upon one purchase; but if laid out at several times, it is sufficient; and if the covenantor dies, having purchased some lands which are left to descend, this will be a satisfaction *pro tanto*. III. 228

In the plea of a purchase, it is a sufficient denial of notice to say that at the time of the purchase he had not notice, without saying, or at any time before. III. 243

In the plea of a purchase or marriage settlement, notice must be denied, though not charged by the bill; and it is best to deny it both in the plea and answer. III. 244 (N)

In the pleading of a purchase or mortgage, the defendant must plead that the seller or mortgagor was or pretended to be seised in fee. III. 281

A trust estate was decreed to be sold to the best purchaser. *A.* articles to buy the estate of the trustees, and brings a bill against them to perform the contract; the court will make no decree but leave the plaintiff to go before the master, and get himself reported the best purchaser. III. 282

Where a man purchases an estate, pays part, and gives bond to pay the residue of the purchase money; notice of an equitable incumbrance before payment of the money, though after the bond, is sufficient. III. 307

A fine and five years' non-claim shall, in favour of a purchaser, bar a trust term, though the *cestui que trust* be an infant. III. 310 (N)

A term assigned by an executor in trust to attend the inheritance, shall, in equity, follow all estates created out of it, and all incumbrances subsisting thereon, and is so connected with it, as not to be severed to the detriment of a *bonâ fide* purchaser, who shall

have the benefit of all interests which the mortgagor had at the time the mortgage was made, unless against an intermediate purchaser without notice. III. 330

Where by the statute of frauds it is said, that judgments shall not bind lands but from the signing, this relates only to purchasers. III. 399

And see Lis Pendens.

Q.

QUAKER.

Where the suit was frivolous, a Quaker defendant allowed to put in his answer without oath or affirmation. I. 781

R.

REAL ESTATE.

Trustee, guardian, or executor, cannot change the nature of the *cestui que trust's* estate by changing a personal into a real estate, nor *e converso*. III. 100

Though the spiritual court cannot intermeddle with a freehold (or real estate) to distribute it, yet chancery can enforce such a distribution. III. 102

See also the statute of 14 *Geo.* 2. *ibid.* (N)

A lease granted to one and his heirs for three lives, is a real estate; and though by the statute of frauds it is made liable to pay debts, yet it is only such debts as bind the heir; and where the spiritual court set aside a will disposing *(inter al')* of such estate, as revoked, this sentence did not affect the devise of such real estate. III. 166

Real estate cannot pass by a will made before the purchasing thereof. III. 170, 171

Where the personal Estate shall or shall not be applied to exonerate the real.

Parol proof admitted to shew the testator's intention that his executrix should retain the personal estate, and not apply it towards the discharge of the mortgage. I. 9, 116

Mortgage in fee is made redeemable on payment of 300*l.* and interest, upon any *Michaelmas*-day on six months' notice; mortgagor dies, having devised his personal estate to his wife; the personal estate is liable to pay the mortgage. I. 291

One having mortgaged his fee-simple estate, devises his leasehold to *A.*, and his fee-simple to *B.*, and dies, leaving no other personal estate; the devisee of the fee-simple must take it *cum onere*, and shall not charge the leasehold estate specifically devised with the mortgage. I. 693

Personal estate not to be applied in exoneration of the real, in cases where a specific or other legatee would be prejudiced; much less shall the *bona paraphernalia* of the wife be so applied. I. 730

One seised in fee of a real and possessed of a personal estate, by will directs that his legacies be paid out of his real estate, and devises his personal estate to his children; his children shall have the personal estate free from the legacies, but charged with the debts, and the real estate only shall be charged with the legacies. II. 366

Portions secured by settlement out of land, or articled so to be, are not to be paid out of the personal estate. II. 437

If a mortgagor borrows money, though there be no covenant in the mortgage deed to pay it, yet his executor will be decreed to pay the money in discharge of the land descended to the heir. II. 455

If one mortgages lands and dies, his personal estate shall go in ease of the real: but if *A.* seised in fee mortgages his land, leaving *B.* his son and heir, and *B.* dies leaving *C.* his heir;

B.'s personal estate shall not be applied to pay this mortgage, because it was not *B.*'s debt. So though the mortgage being transferred in *B.*'s time, *B.* covenants to pay the money, yet the debt not being originally the debt of *B.*, his covenant is only as surety, and the land the original debtor, which *C.* shall therefore take *cum onere.* II. 664

One devises all his personal estate to his daughter, and all his real estate to trustees, in trust to pay debts, &c. remainder to his daughter in tail, remainder over; the personal estate shall in the first place be applied to pay the debts. III. 324

Express words, or words tantamount, are requisite to exempt the personal estate from payment of debts. III. 325

Every mortgage, though without any covenant or bond to pay the money, implies a loan, and every loan implies a debt; therefore an heir of a mortgagor shall compel an application of the personal estate to pay off a mortgage, though there was no covenant, &c. from the mortgagor. III. 358

Matters controverted between the Heir and Executor, &c. See AGREEMENT, HEIR.

RECEIVER.

The appointing a receiver is not in all cases a turning the party out of possession; as where a receiver is appointed of an infant's estate, the receiver's possession is the possession of the infant; but on the appointing a receiver in an adversary suit, as where the plaintiff in ejectment has recovered a verdict; here the receiver's possession seems to be the possession of him that has the right to it. III. 379

As the receiver is the hand of the court, he will be put in possession in a summary way, by ordering the tenants to attorn to him, and granting him a writ of assistance, without first awarding an injunction, which is, in other cases, the usual process. *ibid.* (N)

RECOGNIZANCE.

A recognizance not enrolled shall be looked upon only as a bond, and paid as a debt by specialty. I. 334

So a recognizance not regularly taken may be sued as an obligation. I. 336

Where the court permits the enrolling of a recognizance after the time elapsed, it always takes care not to hurt an intervening purchaser. I. 340

Committee of an infant heiress having given a recognizance, conditioned that he should not suffer the infant to marry without the consent of the court; the form of this recognizance was afterwards moderated, *viz.* that the infant should not marry *with the committee's privity* without the consent of the court. I. 698

One taken on a *supplicavit*, and continued in prison a year without any fresh threatening, discharged on entering into a recognizance before a master in 100*l.*, with two sureties in 50*l.* each, to keep the peace. III. 103, 104

And see SECURITIES.

RECORDER OF LONDON.

See LONDON.

RECOVERY.

Where a purchase is directed to be made, and the land to be settled on *A.* in tail, the remainder over, it is most reasonable for equity to decree the trust to be executed, and the estate settled with remainder over; that so such remainder-man may have the benefit of the chance of tenant in tail's dying before his having suffered a recovery. I. 91

Nothing less than a common recovery suffered by *cestui que trust* in tail is sufficient to bar the remainder-man, or even the issue. By the opinion of Lord *Cowper.* *ibid.*

Upon a settlement *A.* is made tenant for life, remainder to the heirs of his body by his wife; and in the same deed *A.* covenants not to suffer a recovery, but that the lands shall be en-

joyed according to these limitations; *A.* does suffer a recovery, and devises these lands; the covenant good to bind the assets; but *A.* being tenant in tail, and as such having power to suffer a recovery, the lands devised shall not be affected. I. 104

Where money is directed to be laid out in a purchase of land, and to be settled on *A.* for life, remainder to *B.* in tail, remainder to *C.* in fee; if *A.* and *B.* bring a bill for the money, they shall not have it, because of the contingency to *C.*, which cannot be barred without a common recovery; *secus*, where such remainder can be barred by a fine only. I. 470

One seised in fee of the manors of *A.* and *B.* devises them to *C.* for life, and if *C.* shall have issue male, then to such issue male and his heirs for ever; but if *C.* shall leave no issue male, the manor of *A.* to *J. S.* in fee, and that of *B.* to *J. N.* in fee; *C.* suffers a recovery of these manors, it will bar the contingent estates limited to *J. S.* and *J. N.* I. 509

In a marriage settlement the husband was made tenant for ninety-nine years, if he so long lived, remainder to trustees during the life of the husband, &c. remainder to the first, &c. son by the marriage in tail male, remainder to the first, &c. son by any other wife, remainder over; a son is born and of age, the wife dead, and there are no other sons by a subsequent marriage, the trust for preserving contingent remainders descends to an infant; if for the benefit of the family, equity will decree the infant trustee to join in a recovery. I. 536

Cestui que trust in tail brings a bill against his trustees, to the intent they should join in a recovery; this not proper, but it is proper to pray that the trustees may convey the premises to *cestui que trust* in tail, who may then suffer a recovery; though if the trustees are also trustees for any annuities subsisting, they are not compellable to part with the legal estate out of them to the *cestui que trust* in tail. II. 134

Tenant in tail male, remainder to himself in fee, devises his lands to *J. S.*, and then suffers a recovery to the use of himself in fee, and dies without issue male; this is a revocation of the will. III. 163

A. covenants on his marriage to lay out 3000*l.* in the purchase of land, and to settle it on *A.* in tail, remainder to *B.* *A.* purchases the manor of *D.* with this 3000*l.*, and never settles it, but suffers a recovery thereof: as the covenant was a lien on the land; so the recovery suffered thereof discharges the lien, and bars *B.* of the benefit of the covenant, and of the remainder. III. 171

The father tenant for life, remainder to the son in tail, with remainder over. The son is an infant, and on an advantageous match being proposed for the son's marriage, the father and infant son join in marriage articles, and the father only covenants, that within a year after the son's coming to age, the father and son will join in a fine and recovery of the family estate to divers uses. The infant son seals the deed; and within a year after he comes to age, joins with his father in a fine and recovery: the infant son's sealing of these articles not sufficient to declare the uses of the fine and recovery. III. 206

No precise form of words requisite to declare the uses of a fine and recovery, provided the meaning of the parties sufficiently appears. III. 208

Tenant in tail of a rent granted *de novo* without any remainder over, suffers a recovery; this will not give an absolute, but only a determinable fee. III. 230

Tenant in tail of lands mortgaged not bound to keep down the interest, as tenant for life is, even though the tenant in tail shall have died during his infancy, and consequently before it was in his power to have barred the remainder by a recovery. III. 235

And see ENTRY.

REGISTER.

In a poor cause, to save expense, and where the matter is clear, the court will refer it to the register, and not

to the master, to compute the interest or arrears of rent. III. 258

REHEARING.

On the plaintiff's petition to rehear, the cause is open with respect to him as to those parts only complained of in the petition; whereas the defendant is at liberty to object against every part of it. I. 300

In the discretion of the court whether or no to grant a rehearing. III. 8

Order for a rehearing refused to be discharged, though at the distance of about twenty-four years. *ibid.* (N)

An agreement was signed by the parties, and by consent made an order of court, to submit to such decree as the court should make, and neither party to bring an appeal; yet the cause allowed to be reheard. III. 242

RELATION.

One having a right to administer to *J. S.* brings a bill for an account of *J. S.*'s personal estate, which bill being demurred to, the plaintiff took out administration to *J. S.*, and charged the same by way of amendment; this held to be sufficient, for that the administration, when taken out, related to the time of the death of the intestate. III. 351

So where an executor, before probate, files a bill, and proves afterwards the will; such subsequent probate makes the bill a good one. *ibid.*

See *concerning the Relation of Judgments signed in Vacation, to the preceding Term*, title SECURITIES.

RELEASE.

A will cannot operate as a release. I. 85

No reason to set aside a release because the party releasing had a right; *secus*, if ignorant of his right, or if the same was concealed from him. I. 239, 728

Where one by will gives a debt which is owing to him, this cannot in strictness operate as a release. II. 332

Devise to such of the children of *A.* as shall be living at his death. *A.* has issue *B.*, who becoming a bankrupt, gets his certificate allowed, after which *A.* dies; this contingent interest is liable to the bankruptcy, forasmuch as the son in the father's lifetime might have released it. III. 132

Where a daughter of a freeman of *London* accepts of a legacy of 10,000*l.* left her by her father, who recommended it to her to release her right to her orphanage part, which she does release accordingly; if the orphanage be much more than her legacy, though she was told she might elect which she pleased; yet if she did not know she had a right first to inquire into the value of the personal estate, and the *quantum* of her orphanage part, before she made her election; this is so material, that it may avoid her release. III. 316

In what manner a party releasing ought to be informed of his right, so as to be bound by such release. III. 321

Though, generally speaking, an executor or trustee compounding, or releasing a debt, must answer for the same; yet if it appears to have been for the benefit of the trust estate, it is an excuse. III. 381

As to the Child of a Freeman's releasing his Orphanage Part, see title LONDON.

RELIEF.

A bill is brought by a lord of a manor to recover a fine for a copyhold, on a suggestion, that the defendant was admitted by attorney, but sometimes pretends the attorney had no authority to take such admittance; the defendant answers as to part, and demurs as to relief; the demurrer held good. III. 148

Lord brings a bill against tenant to recover a quit-rent, alleging that the land out of which the quit-rent issues, by reason of the unity of possession of that with other lands, is not known; the defendant answers as to discovery, and demurs as to relief; demurrer good. *Quære.* III. 149

REMAINDER.

If *A.* be a copyholder in tail, remainder to *B.* in fee, and *A.* takes a grant of the freehold from the lord to him and

his heirs, and dies without issue; *Qu.* If *B.*, in whom there was once a vested remainder in fee in the premises, is not entitled to the same? III. 10 (N)

Where a term for years is devised to *A.* for life, remainder to *B.*, and the executor assents to the devise to *A.*, this is a good assent to the devise over. III. 12

Where the use of goods is given to one for life, remainder over; the *cestui que use* for life must sign an inventory, expressing that he is entitled to these things for his life, and that afterwards they belong to the person in remainder. III. 336

See more *concerning Remainders being good, under* tit. *Limitation of Terms for Years*, &c. Tit. ESTATE; also under tit. RENTS.

RENT.

Lessor dies on *Michaelmas*-day, and before sun-set; the heir or jointress, not the executor, shall have the rent. I. 177

[*Qu.* If the lessor had died after sun-set and before midnight. *ibid.*]

If the tenant had paid the rent on the day, the payment had been good, though the lessor had died before sun-set; but the executors to account for this to the jointress. *ibid.*

Quære tamen.

Where lessor reserves a rent, and dies on the rent-day about twelve at noon, if the lease must determine by his death, the rent, rather than be lost, shall go to his executors; *secus*, if the lease is to have a continuance. I. 180

Tenant for life leases for years, rendering rent half-yearly, and dies in the middle of the half-year; equity will not apportion the rent as to time. I. 392

Vide autem 11 *Geo.* 2., by which rent is apportioned in point of time.

J. S., lessee of land to him and his heirs for three lives, assigns the whole estate, reserving a rent to him and his executors, and dies; his executors, and not his heirs, are entitled to the rent. I. 555

A tenant who had paid taxes on account of a charity which appeared to be exempted from taxes, not suffered to be relieved out of the arrears of rent in his hands. III. 128 (N)

As the profits of the wife's land would belong to the husband during the coverture, so the rent issuing out of the land during that time, and which is payable by the tertenant in respect of the profits, belong to the husband, who may avow alone for rent incurred during the coverture. III. 200

If a rent *de novo* be granted in tail, without any remainder over, and tenant in tail takes wife, and dies without issue; the wife shall not be endowed, because the thing out of which the dower is to arise is not in being. *Secus*, if the rent were granted in tail, remainder over. III. 230

Tenant in tail of a rent granted *de novo*, without any remainder over, suffers a recovery; this will not pass an absolute, but only a determinable fee. *ibid.*

On what supposition the law allows the remainder of a rent granted *de novo*, to be good. *ibid.* (N)

One devises a rent charge to be sold to pay legacies amounting to 800*l.*; and if the rent charge should sell for 1000*l.*, the testator gives a further legacy of 200*l.* The rent charge sells for above 800*l.*, and less than 1000*l.*, what exceeds the 800*l.* shall belong to the heir. III. 252

A legacy out of a rent-charge shall carry interest. III. 254

In a poor cause, to save expense, and where the matter is clear, the court will refer it to the register, instead of a master, to compute the arrears of rent. III. 258

At law there could be no general occupant of a rent: as if I had granted a rent to *A.* for the life of *B.*, and *A.* had died living *B.*, the rent would have determined. III. 264 (N)

If a man had granted a rent to *A.*, his executors and assigns, during the life of *B.*, and afterwards the grantee had died, leaving an executor, but no assignee, the executor should not have had the rent, which being a freehold, could not have descended to an exe-

cutor; but this is helped by the statute of frauds, since which, if a rent be granted to *A.* for the life of *B.*, and *A.* die, living *B.*, *A.*'s executors or administrators shall have it during the life of *B.*, for the statute is made not only to prevent the inconveniency of scrambling for the estate, but also for continuing it during the life of the *cestui que vie.* III. 264 (N)

See also *Matters controverted between Heir and Executor*, under tit. HEIR.

Fee-Farm Rent.

Patentees of fee-farm rents have the same power of distress as the king had, and so may distrain on other lands of the tenant, though not subject to the rent, but not on such other lands as are let out by the tenant, or extended. *Qu.* If they may distrain on other lands of the tenant under sequestration. I. 306, 307

Quit-Rent.

An owner of a quit-rent ought to pay taxes in proportion only to what the land pays: but if the matter has been examined by the commissioners of the land-tax, this court will not re-examine it. I. 328

Lord brings a bill against tenant to recover a quit-rent, alleging that the land out of which the quit-rent issues, by reason of the unity of possession of that with other lands, is not known; the defendant answers as to discovery, and demurs as to relief; the demurrer good. *Quære.* III. 149

Though a bill in equity to recover a quit-rent may, under some circumstances, be proper, yet it ought to appear therein that the plaintiff has no remedy at law. III. 256, 257

REPLICATION.

A defendant in his plea of a purchase for a valuable consideration omits to deny notice; if the plaintiff replies to it, all the defendant has to do, is to prove his purchase. III. 94

If a defendant puts in an answer to a bill brought by an infant, who does not reply to it, such answer must, it seems, be taken to be true; in regard the defendant, for want of a replication, is deprived of an opportunity of examining witnesses to prove his answer. III. 237 (N)

Quære tamen.

And see PLEA.

RESCUE.

In an indictment for a rescue of a prisoner, the word *rescussit*, or something equivalent, must be used to shew it was forcible and against the will of the keeper. III. 484

RETAINER.

See EXECUTOR.

RETURN.

One who had been a prisoner in *Newgate* for debt, but since removed to the *Fleet* is excommunicated; the Court of Chancery will not direct the cursitor to make out the writ of *excommunicato capiendo* to the warden of the *Fleet;* but the writ may be directed to the sheriff, who may return a *non est inventus*, and on this return, *B. R.* may grant an *habeas corpus*, and thereon charge him with an *excommunicato capiendo.* III. 53

REVERSION.

A. has two sons, *B.* and *C.*, and on the marriage of *B. A.* settles part of his lands on *B.* in tail; and *A.* being seised in fee of the reversion of these lands, and of other lands in possession, devises *all his lands and hereditaments not otherwise by him settled or disposed of;* the reversion in fee will pass. III. 56

The reversion in fee is part of the old estate; and if the owner had the land as heir of the mother, the same shall descend to the heir on the mother's side: so if it was *Borough English* or *Gavelkind*, it shall descend accordingly. III. 63

Regularly a remainder is carved out of a reversion, so that where there would

have been no reversion, there can be no remainder: but this does not hold in the case of a rent created *de novo*, of which the law allows a remainder to be granted. III. 230 (N)

A., tenant for years, remainder to *B.* for life. *A.* is doing waste; *B.*, though he cannot bring waste, as not having the inheritance, yet he is entitled to an injunction. But the court will not enjoin, unless the reversioner in fee be made a party, who possibly may approve of the waste. III. 268 (N)

REVIEW, BILL OF.

See BILL.

REVIEW, COMMISSION OF.

A commission of review to reverse a sentence given by the court of delegates is matter of discretion, not of right; and if it be a hard case, the chancellor will advise the crown to deny it. II. 299

REVOCATION.

An appointment by deed of particular annuities to be paid out of an office is in its nature revocable. I. 101

Of two voluntary settlements, if the first is made without a power of revocation against the intent of the party, the second shall prevail. I. 581

Where in a trust term to raise portions there is a power for the husband, with consent of trustees, to revoke the uses in the settlement; this suspends the vesting of the portion. II. 101

If one has made himself tenant for life of lands in *Dale*, with a power by any writing, &c. to revoke these uses and limit new ones; and he afterwards by will devises all his lands in *Dale*, &c. to *J. S.*, having no other lands in *Dale*, except these; they shall pass, if the will be circumstanced as the power requires, though no mention be made of the power. II. 415

Revocation of a Will.

See WILL.

S.

SATISFACTION.

One covenants to leave his wife 620*l.*, and dying intestate, her share comes to more; this held a satisfaction. I. 324

A legacy given to *J. S.* shall not be taken to be a satisfaction of a subsequent debt. II. 343

Husband by will gives an annuity of 10*l. per annum* to his niece *A.*, an annuity of 10*l. per annum* to his niece *B.*, and makes his wife executrix; the wife by her will gives 10*l. per annum* to the said *A.* and 10*l. per annum* to the said *B.*, to take effect upon the contingencies of their surviving their respective mothers; these must be intended additional annuities, and not in satisfaction of those given by her husband's will. So though not given upon such contingencies, and greater in point of duration, yet if not expressed by the wife to be in satisfaction of the annuities given by the husband, the court will allow them the annuities given by both wills. II. 553

One gives a bond on his marriage, either within four months to settle lands of 100*l. per annum*, on his wife, or that his heirs, executors, &c. shall pay her 2000*l.* within four months after his death; husband after this devises to his wife lands of 88*l. per annum*, this shall not be taken in part of the 100*l. per annum*, but only as a benevolence. II. 614

Money and land being things of a different kind, the one, though of greater value, shall never be taken in satisfaction of the other, unless so expressed. II. 616

A freeman of *London* before marriage settles some part of his personal estate upon his intended wife, to take effect after his death, without mentioning it to be in bar [or satisfaction] of her customary part; this will bar her of such customary part. III. 15

It is the intention of the party, which makes the pretended equivalent a satisfaction or not. III. 225

A father's permitting lands to descend in fee, just of the same value with lands covenanted to be settled in tail; this is a satisfaction. III. 225
A matter of less value not to be taken in satisfaction for what is of a greater value. III. 226
Lands of much greater value left to a daughter, no satisfaction for a portion. *ibid.*
Et vide infra.
30,000*l.* is covenanted to be laid out in land: the money need not be laid out all together upon one purchase; but if laid out at several times, it is sufficient; and if the covenantor dies, having, after the covenant, purchased some lands which are left to descend, this will be a satisfaction *pro tanto.* III. 228
In a settlement a term was raised for daughters' portions, *viz.* 10,000*l.*, with a proviso, that if the father by deed or will should give or leave the sum of 10,000*l.* to his said daughters, it should be a satisfaction; the father leaves land to the daughters of the value of 10,000*l.*, this no satisfaction. III. 245
Et vide supra.
Money and land go in a quite different channel, and therefore the one not to be taken in satisfaction for the other. III. 247
Husband on marriage settled 100*l. per annum* pin-money in trust for his wife, for her separate use, which becomes in arrear, and then the husband by will gives the wife a legacy of 500*l.*, after which there is a further arrear of the pin-money, and then the husband dies; this legacy, being greater than the debt, decreed, even in the case of a wife, to be a satisfaction of pin-money due before the making of the will. III. 353
Where pin-money is secured to the wife, and the husband finds her in clothes and necessaries; this is a bar [or satisfaction] as to any arrears of pin-money incurred during such time. III. 355
One having by his will given his wife 600*l.* in money, on his death-bed ordered his servant to deliver to his wife, then present, two bank notes, payable to bearer, amounting to 600*l.*, saying, he had not done enough for his wife: this gift held to be additional, and not to be a [satisfaction or] payment of the former legacy in the testator's lifetime. III. 356
And see LEGACY, PORTIONS.

SCANDAL.

On an answer's being reported not scandalous or impertinent, if the plaintiff except to the Master's report, he must shew specially wherein it is scandalous or impertinent. II. 181
Where a bill or answer is referred for scandal and reported to be scandalous, if the Master has once expunged this scandal, the party cannot except, as it will not appear on record what that scandal was; and it was the party's own fault that he did not except to the report sooner. II. 182
The defendant having answered the bill, cannot afterwards refer it for scandal. II. 311

SCHOOL AND SCHOOL-MASTERS.

The spiritual court has jurisdiction of grammar-schools: but in case of a libel for teaching school generally, without licence, if it does not appear what school, the temporal courts will grant a prohibition. I. 29
Two schools in the same town, one a free school and the other a charity school for boys and girls; *A.* devises 500*l.* to the charity school, though both be charity schools, yet only that for boys and girls shall take. I. 674
The king founds a school and endows it, appointing governors who have the legal estate of this endowment vested in them, but there are no express words appointing them visitors; resolved a commission may issue to visit and call to an account these governors. II. 325

SCOTLAND.

A *ne exeat regno* lies to prevent one's going to *Scotland:* but in such case

the condition of the recognizance must be particularly worded. I. 263

Since the act of union, a *Scotch* peer made an *English* peer cannot by virtue thereof sit and vote in parliament. I. 582

In *Scotland* the trials and prosecutions for treasons are by the late statute of Union the same as in *England*. I. 617

A copyholder in fee by will charges his lands with his debts; the lands being in *England*, and the heir an infant in *Scotland*, the creditors bring a bill to have their debts paid out of the copyhold premises; whereupon the heir appears, and there is an attachment for want of an answer: but the heir being an infant, the next step is to bring up the body; the heir being in *Scotland*, and out of the reach of the process of the court, the plaintiff cannot bring up the body; the infant shall answer by a certain time, or shew cause why a receiver should not be appointed. II. 409

Whether a leasehold estate in *Scotland* can be valued here as personal assets, as a leasehold in *Ireland* may. II. 622

SECURITIES AND INCUMBRANCES, JUDGMENTS, STATUTES, AND RECOGNIZANCES.

A statute creditor of *J. S.* if *J. S.* becomes bankrupt, and the statute not sued and executed before the bankruptcy, shall come in only *pro ratâ*, though there were lands in fee bound by the statute. I. 92

A trustee confesses a judgment; this will not in equity bind the estate. I. 278

A. conveys an estate by a conveyance that is defective, (as for want of livery) and afterwards confesses a judgment; this shall not in equity affect the estate. I. 279

Mortgagee of a ship is witness to a second mortgage thereof; though no actual proof of his knowing the contents, yet since the presumption is, that he might have known them, this shall postpone him. I. 394

Mortgagee of a ship by deed intrusts the mortgagor with the original bill of sale, who indorses thereon subsequent mortgages or bills of sale of several parts of the ship, and the mortgagee acquiesces; this is evidence of an assent in such mortgagee, and shall postpone him. *ibid.*

One agreeing to leave his wife 1000*l.* within three months after his death, cannot be enforced in equity to amend the security. I. 460

A. a trader, seised in fee of lands, gives judgment to *B.*, and having sold the land to *C.* becomes a bankrupt; though the judgment creditor cannot come in for more than his proportion with the other creditors of the bankrupt, whether he may not extend the land in *C.* the purchaser's hands. I. 737

So if *A.* the trader had given judgment to *B.*, and having articled for a valuable consideration to sell to *C.* had become a bankrupt, the judgment should have bound the land in the hands of *C.*, but whatever money the purchaser had been to pay to the bankrupt should have been liable to the bankruptcy. *ibid.*

Where the cognizee of a statute extends lands in one county, which extent is afterwards returned and filed, yet all the lands of the cognizor, though in other counties, shall be made liable upon an application in chancery. II. 91

Third mortgagee buys in the first, though pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee shall tack the first to his third mortgage. II. 491

If a creditor by judgment, statute, or recognizance, buys in the first mortgage, he shall not tack it to his judgment, because he did not lend his money on the credit of the land, has no present right therein, nor can be called a purchaser. *ibid.*

If a puisne mortgagee buys in a judgment or statute, being the first incumbrance, he shall hold until by law he can be evicted. II. 493

The first mortgagee lends a further sum

to the mortgagor upon a statute or judgment; he shall retain against mesne mortgagees till the statute or judgment is paid. II. 494

If a puisne mortgagee buys in a prior judgment extended on an *elegit* at an under-value, he shall hold the extent till evicted at law. *ibid.*

But in all these cases there must not be notice of the mesne incumbrance when the money is lent. II. 495

If a puisne incumbrancer buys in a prior mortgage, and the legal title be in a trustee, or in any third person, the buying in such mortgage will not avail: but in all cases where the legal estate is standing out, the incumbrances must be paid according to their priority. *ibid.*

The court will not, without difficulty, set aside a security made under a decree, and approved of by the master. III. 8

One being seised of lands in fee in *A.*, and possessed of an extended interest upon a statute in *B.*, devises all his lands, tenements, and real estate in *A.* and *B.* to *J. S.* and his heirs; this will not pass the extended or chattel interest in *B.*, especially if there be another clause in the will, which (*inter al'*) disposes of all the testator's debts or credits. III. 26

Where a judgment was given to a Papist, it was resolved he could not extend the land, for that would give him an interest in the land, contrary to the express words of 11 & 12 *W.* 3. which makes Papists incapable of taking any interest in land. III. 46 (N)

If the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration. If a judgment be given in trust for a feme sole, who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over the extended interest. And by the same reason, if a feme has a decree to hold and enjoy lands, until a debt due to her is paid, and she is in possesssion under this decree, and marries, the husband may assign over the benefit of this without any consideration, for it is in nature of an extent. III. 200

Where a man purchases an estate, pays part, and gives bond to pay the residue of the money; notice of an equitable incumbrance before payment of the money, though after the bond, is sufficient. III. 307

The court will not order the filing an original to make good a judgment on error brought, without some excuse for not having filed one before; though a slender excuse may be sufficient. III. 314

A term assigned to attend the inheritance shall, in equity, follow all the estates created out of it, and all incumbrances subsisting upon it. III. 330

Where by the statute of frauds it is said, that judgments shall not bind lands, but from the signing, this relates only to purchasers; therefore, as between creditors, a judgment entered in the vacation relates to the first day of the preceding term. III. 399

A. died seised of some lands in fee, and considerably indebted by judgment and simple contract; and after the death of *A.*, and before the essoign day of the next following term, many of the judgment creditors delivered *fieri facias's* to the sheriff, who took the goods and furniture in execution. In this case it was held, that the judgment creditors having lodged their writs of execution in the same vacation that the party died, it related to the teste of the writ as to all but purchasers; consequently, that these goods were as evicted from *A.* in his lifetime; by which means the simple contract creditors, who desired to stand in the place of the judgment creditors upon the land in proportion, as these had exhausted the personal estate, (supposing *A.* to have left the said personal estate at his death) were without remedy. III. 399, 400 (N)

A. owes money by several judgments and bonds, and dies intestate. His administrator pays the judgments and some of the bonds, and pays more than the personal estate amounts to. What the administrator paid on the

judgments must be allowed him: but as to what he paid on the bonds, he must come in *pro ratâ* with the other bond creditors out of the real assets. III. 400

A decree of the Court of Chancery is equal to a judgment in a court of law; and where an executrix of *A.* who was greatly indebted to several persons in debts of different natures, being sued in chancery by some of them, appeared and answered immediately, admitting their demands, (some of the plaintiffs being her own daughters) and other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the Court of Chancery, being for a just debt and having a real priority in point of time, not by fiction and relation to the first day of term, was preferred in the order of payment to the judgments; and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings at law stayed against her by injunction. III. 402 (N)

Where a man purchases an estate, pays part, and gives bond to pay the residue of the money; notice of an equitable incumbrance before payment of the money, though after the bond, is sufficient. III. 307

A term assigned by an executor in trust to attend the inheritance shall, in equity, follow all the estates created out of it, and all the incumbrances subsisting upon it. III. 330

Securities bought in for less than is due.

See COMPOSITION.

In what Cases Security has or has not been required.

Where the will does not require that the executor should give security, it is not usual for the court to insist on it, until some misbehaviour: but where one by will charged the residue of his personal estate with 40*l.* *per annum* to his wife, to be paid quarterly, the executor was ordered to bring before the master sufficient in bonds and securities, to be set apart to secure this annuity. III. 336

Where the spiritual court has refused to grant the probate of a will to an executor reputed to be in bad circumstances, and absconding, until he should give security for a due administration of the assets, *B. R.* has, in such case, enforced the granting of the probate by a peremptory *mandamus.* III. 337 (N)

SEQUESTRATION.

See PROCESS, DECREE.

SHERIFF.

Debt against the sheriff for an escape of one in execution on an outlawry after judgment, may be brought either in the *tam quam*, or at the suit of the party only. I. 687

One that had been a prisoner in *Newgate* for debt, but since removed to the *Fleet*, is excommunicated; the court of chancery will not direct the writ of *excommunicato capiendo* to the warden of the *Fleet*; but the writ may be directed to the sheriff, who may return a *non est inventus*, and on this return, *B. R.* may grant an *habeas corpus*, and thereon charge him with an *excommunicato capiendo.* III. 53

The sheriff is the proper officer to execute process; only where he is party, or otherwise incapacitated, it must be directed to the coroner. III. 55

SHIP.

On a ship's being repaired in the river *Thames*, and fitted out there with new rigging and apparel, the ship herself is not liable, but the owners; *secus*, if repaired or fitted out at sea, where the master alone may hypothecate the ship. II. 367

Money was lent on the mortgage of a ship without any covenant for payment of the money. The ship was taken at sea, and the mortgagor died; the executors of the mortgagor decreed to pay the mortgage money. III. 360

SOLICITOR.

See ATTORNEY.

SOUTH SEA COMPANY.

In the case of the *South-sea* company in whom the estates of the late directors are vested by act of parliament; where the statute of limitations might have been pleaded against the late directors, it is pleadable against the company, who stand but in such directors' place. III. 143

SOUTH-SEA STOCK.

See STOCK.

SPECIFIC DEVISE OR LEGACY.

See LEGACY AND LEGATEE.

SPECIFIC LIEN.

See LIEN.

SPECIFIC PERFORMANCE.

When to be decreed, and when not.

See AGREEMENT.

SPIRITUAL COURT.

See COURTS.

STATUTES.

Whether a preamble of an act of parliament be proper to explain the general words in the body. I. 317

No new thing, but usual that an interest raised by a subsequent statute, should be under the same remedy and advantage, as an interest existing before. Thus the statute of 32 *H.* 8. enabling a man to devise his lands, has been in some respects held to be within the equity of 27 *H.* 8. So the act of 12 *Car.* 2. erecting the excise, may, with regard to the sale of offices within that branch of the revenue, be within the reason of the 5 & 6 of *Ed.* 6. III. 393, 394 (N)

Instances where penal laws have not been extended by an equitable construction. III. 431

The preamble of an act of parliament said to be the key for opening the meaning and intent of the act. III. 434

In what cases and under what circumstances an affirmative law, without negative words, may repeal or take away the force of a former law. III. 491

Statutes of Bankruptcy.

See BANKRUPTS.

Statute of Distribution.

See DISTRIBUTION, WILL.

Statute of Frauds and Perjuries.

See AGREEMENT, PURCHASE, SECURITIES, WILL, &c.

Statute of Limitations.

See LIMITATIONS.

Statute of Toleration.

See DISSENTERS.

STATUTE.

See SECURITIES.

STOCK.

A bill in equity will not lie for a specific performance of an agreement to transfer *South-sea* stock. I. 570

One transfers *South-sea* stock by virtue of a forged letter of attorney; the transfer adjudged void, and the right owner not hurt, and the dividends received under this forged letter of attoney to be taken back from the assignee and restored to the right owner. II. 76

A goldsmith, without any orders from the proprietors, subscribing lottery orders into the *South-sea*, indemnified by act of parliament. II. 166

In a bill to compel a performance of an agreement for transferring 5000*l.* *York-buildings* stock at 7*l.* 5*s.* *per*

cent. defendant demurred, but demurrer over-ruled, for the case may be attended with such circumstances as may make it just to decree a specific performance of the parties' own agreement, or at least to pay the difference. II. 304

The judges equally divided on this question, whether a contract for stock be within the statute of frauds, which mentions goods, wares, and merchandizes, so as to require the contract to be in writing, or earnest money to be paid. II. 308

Buying and selling of stock will not make one a bankrupt. *ibid.*

A., who is a trustee for *B.* of 1000*l.* *South-sea* stock, at the desire of *B.* borrows 4000*l.* on this stock of the company; and *B.* receives the money; *A.* pays the 10*l. per cent.* upon the late act of 7 *Geo.* 1. to be discharged of the loan; though *B.* had forbid the payment, yet he is liable. II. 453

A trader in *London* having money of *J. S.* (who resided in *Holland*) in his hands, bought *South-sea* stock with it in his own name, but entered it in his account book as bought for *J. S.*, after which the trader became bankrupt; the trust stock not liable to the bankruptcy. III. 187 (N)

All the *South-sea* loans were advanced on the credit of the stock, without inquiring after the ability of the borrower. III. 361

SUBPŒNA.

See PROCESS.

SUPPLICAVIT.

See WRITS.

SURETY.

A. is principal in a recognizance for 5000*l.*, and *B.* and *C.* are sureties, *A.* afterwards jointures his wife in some lands, without notice, either to the wife or her friends, of this recognizance, and devises his real and personal estate to *B.* one of his sureties, and dies; first, the personal estate of *A.* the principal shall be applied towards satisfying this recognizance, then his lands devised, the devisee being a volunteer; next, the *paraphernalia* of the wife of *A.* the principal; and, lastly, the two sureties shall contribute to make up the deficiency. II. 542

And see BAIL.

SURVIVOR.

A guardianship is devised to three, without saying *to the survivors or survivor of them;* yet the survivor shall have it. II. 102

Baron and feme bring a bill to redeem, defendants plead, and the plea being over-ruled, 5*l.* costs are given to the plaintiffs, baron dies; the feme by survivorship shall have the costs. II. 496

Where a bond is given to a baron and feme during the coverture, it shall on the death of the baron survive to the wife. II. 497

A. makes two executors, *B.* and *C.*, appointing them residuary legatees; *B.* dies; the whole shall survive to *C.* II. 529

Where a bare authority is given to two, it shall not survive without express words for that purpose. II. 628

And see JOINTENANTS.

T.

TAXES.

An owner of a quit-rent ought to pay taxes in proportion to what the land pays: but if the matter has been examined by the commissioners of the land-tax, this court will not re-examine it. I. 328

No bill will lie for a tenant to be relieved out of the arrears of rent for taxes which the tenant has actually paid on account of rent reserved to a charity, which appears to be exempted from taxes. III. 128 (N)

Where land was mortgaged for securing an annual payment of 20*l.* to a wi-

dow in satisfaction of her dower; this annual payment being secured out of land, ought to answer taxes as the land does: but if the tenant, in his payment of the annuity to the widow, omits to deduct for taxes, he shall not make her refund in equity. III. 128(N)

TENANTS IN COMMON.

See JOINTENANTS.

TENDER OF MONEY.

See MORTGAGE.

TERM FOR YEARS AND TERM TO ATTEND THE INHERITANCE.

See title ESTATE.

TERM AND VACATION.

In vacation time one may resort to the chancery for a prohibition returnable into *B. R.* or *C. B.* I. 43, 476

Though the next day after the last day of the term be not in strictness part of the term, and therefore no motion can be made on the petty bag side in chancery, yet as to other purposes it is part of the term; for which reason a motion made at that time to dismiss a bill for want of prosecution, on a certificate that there had been no prosecution within three terms, of which the last term was one, was denied. I. 522

So where the last seal continued three days, and computing the third day according to the day of the month, the time would be expired for making a report absolute; yet this not so, it being only a continuance of the first day. *ibid.*

As to all but purchasers (not creditors) judgments entered in the vacation relate to the first day of the preceding term. III. 399

TIMBER.

A. tenant for life, with remainder to his first, &c. son in tail, remainder to *B.* for life, remainder to his first, &c. son in tail, remainder to *C.* in tail; *A.* cuts down timber; *A.* and *B.* having no son born, *C.* is entitled to the timber both in law and equity. II. 240

A. seised in fee of lands demised the premises to trustees *B.*, *C.*, and *D.*, for 500 years, in trust to pay debts, and for a charity; *B.* one of the trustees being in possession, and as a receiver appointed by the court, cuts down 1000*l.* worth of timber, *D.* one of the other trustees consenting; *B.* the trustee for the charity, or as receiver, ought not to take advantage of his having possession, without which he could not cut down the timber, yet the timber must be valued according to what it would be worth at the end of the term. II. 397

A trustee of a term of years for a charity purchases the reversion in fee; he shall not cut down the timber; if he does, he must make satisfaction to the charity. II. 398

In a purchase, where timber is agreed to be valued, the custom of the country makes those trees timber which in their nature are not so; as birch, beech, and pollard trees, if the bodies are sound, to be valued as timber. II. 606

Walnut-trees, where of considerable value, to be estimated as timber. *ibid.*

Where trees are of value, and the parties cannot agree in the valuation of them as timber; the court will send it to be tried, whether by the custom of the country any, and which, of these trees are timber. *ibid.*

A. tenant for life, remainder to *B.* in tail, as to one moiety, remainder to *C.* an infant in tail, as to the other moiety, remainder over. There is timber on the premises greatly decaying; *B.* the remainder-man brings a bill, praying that the decaying timber may be cut down, sold, and the money divided between him and the infant; the tenant for life ordered to have sufficient left for repairs, and an allowance for damage done to him on the ground: but not to be considered for the timber, which, when severed by any means whatsoever, belongs to the first owner of the inheritance. Decaying timber not to

be cut down, if for ornament or safety. Also where an infant is concerned in the inheritance, no timber to be cut down without the approbation of the master, and the infant's money to be put out for his benefit. III. 267

TITHES.

A *modus* for tithes of corn for the inhabitants of such a tenement, or the lands therewith usually enjoyed, void for the uncertainty; in regard the tenement may be uninhabited, and the land often shifted and let with other farms. II. 462

Turkeys titheable: but if tithe be paid of the eggs, then no tithe to be paid for the chicken. *ibid.*

Mills are titheable, but to be paid only as a personal tithe of the clear gains, after all manner of charges deducted. II. 463

In a bill for tithes in the exchequer, that court never decrees the payment of tithes for the future, but only to the time of the bill filed: but chancery, to the time of the decree. *ibid.*

A *modus*, that in consideration the parishioners made the tithe-grass into hay, therefore the parishioners, inhabitants within the parish, were to pay no tithe for the herbage of dry and unprofitable cattle; and though proved, that the parishioners time out of mind had paid no tithe of this herbage, yet the court held it to be a material objection to the *modus*, that foreigners living out of the parish made the tithe-grass into hay, and nevertheless paid tithe-herbage. II. 520

A void *modus*, that the making the tithe-grass into hay should not only excuse that ground from paying tithe for herbage, but that perhaps a small quantity of meadow-ground, by making the grass thereof into hay, should excuse the greater part of that parish from paying tithe-herbage. II. 521

A *modus* in relation to the tithe due to the parson, may be a good bar to the payment of a small tithe due to the vicar; because all the tithes did at first belong to the parson, during which time he might agree to such *modus*. II. 522

Parishioners only bound to cut the grass and to lay it in heaps or cocks, but not to make it into hay. II. 523

A *modus*, that every occupier of land within the parish of *A.* living out of the parish, shall pay 1*d. per acre* for all pasture lands within the parish, but if he lives within the parish, to pay tithes in kind; a good *modus*. II. 565

Every *modus* must be certain, else it is void, and no length of time will make it good. Thus a *modus* to pay 1*d. per ann.* or *thereabouts*, for every acre, is void: but a *modus* to pay 12*d. per* acre for every acre of upland, and 6*d.* for every acre of marshland, good. II. 572

A *modus* need not be the same every year, as while the religious houses held the lands in their own hands. *ibid.*

Not necessary to shew a *modus* had a reasonable commencement; for it might at first be so, and yet not be capable of being shewn at this great distance of time. II. 573

Sufficient that the parson, patron, and ordinary, might at first make this agreement, and bind the succeeding parsons; and though the instrument of the agreement be lost, yet the *modus* will be good. *ibid.*

One has no land in *A.* but has tithes there, and devises all his land in *A.* The tithes, as they are issuing out of the land, and part of the profits thereof, shall pass. III. 386

TRADE.

Captain of a ship dies leaving money on board, the mate becomes captain and improves the money in trade; he shall, on allowance made him for his care in the management of such money, account for the profits, and not for the interest only. I. 140

A bond or promise to restrain one's self from trading in a particular place, if upon a reasonable consideration, is good; *secus*, if it be not given on a reasonable consideration, or to re-

strain a man from trading at all. I. 181

A tradesman in *London*, by order of a tradesman in the country, sends goods to the latter, who does not appoint or name the carrier; afterwards the carrier embezzles the goods; the trader in the country must stand to the loss. III. 186

A trader in *London* having money of *J. S.* (who resided in *Holland*) in his hands, bought *South-sea* stock in his own name, but entered it in his account book as bought for *J. S.*, after which the trader became bankrupt; determined that this stock was not liable to the bankruptcy. III. 187 (N)

And see BANKRUPTS, PARTNERS.

TRANSPORTATION.

See FELONY.

TREES.

See TIMBER, WASTE.

TRIAL AND NEW TRIAL.

Bill lies to perpetuate testimony before trial, on affidavit annexed that the plaintiff's witnesses are infirm and unable to travel. I. 117

Where the jury bring in their verdict contrary to the direction of the court, a new trial may be granted even after a trial at bar. I. 212

In prosecutions of the crown, though since the late statute of 4 & 5 *Annæ*, *cap.* 16. the *venire facias* which was awarded *de vicineto*, and not *de corpore comitatus*, held good. I. 223

On a *scire facias* to repeal a charter, the defendant shall not have a new trial without paying costs. I. 224

In case of a trust estate devised to be sold, or devised to *J. S.*, if the will be disputed, equity, after two trials in its favour, will grant a perpetual injunction. I. 671

So after several trials in ejectment, and verdicts in all in favour of the will, equity, on a bill of peace, will grant a perpetual injunction. I. 672

In case of an issue out of chancery, it is proper to move that court for costs in not going on to trial. II. 68

The court refused to grant a new trial after a trial at bar, where the issue tried related only to the intention of the party, not to any legal title, and where the question might have been determined at the hearing, without ever sending it to a trial. II. 564, 565

Trial of the custom of *London* by the certificate of the recorder, and what, and against whom the remedy is to be had in case of a false certificate, see title LONDON.

As for the manner of trial of clerks convict before the ordinary, see title CLERGY.

TRUST AND TRUSTEES.

Where a purchase is directed to be made, and the land settled on *A.* in tail, with remainder over; the court ought not to decree the money to be paid to *A.*, but a settlement to be made and the trust executed, that so the remainder-man may have the benefit of the chance of tenant in tail's dying before his having suffered a common recovery. I. 91

Bare articles, or only a deed executed by *cestui que trust* in tail, seems hardly sufficient to bar the intail. *ibid.*

Trust-estates are to be governed by the same rules as legal estates. I. 109

One devises lands for payment of debts, and then to *A.* for life, with power to make leases, &c. remainder to the heirs male of the body of *A.*; though this be but the devise of a trust and executory, and expressed to be to *A.* for life, yet it is an estate-tail in *A.* barrable by a fine. *Secus*, in case of marriage articles to settle lands in that manner. I. 142, 290

One who is a bare trustee, is a good witness to prove the execution of a deed to himself. I. 290

A., a freeman of *London*, purchases lands in the name of *B.*, but no trust declared. *A.* dies, and *B.* gives a declara-

tion of trust; this good against the custom. I. 321
Evidence of a trust, where an estate is purchased in another's name. *ibid.*
A. is a trustee for *B.* as to an estate, and lays out money in relation thereto, after which *B.* assigns the trust to *C.*, who brings a bill for a conveyance of the estate; *C.* shall have no conveyance until *A.* is paid all the money by him expended or due in relation to the premises. I. 780
Cestui que trust in tail brings a bill against his trustees to the intent that they should join in a recovery; this not proper, but it is proper to pray that the trustees may convey the premises to *cestui que trust* in tail, who may then suffer a recovery; though if the trustees are also trustees for any annuity subsisting, they are not compellable to part with the legal estate out of them to the *cestui que trust* in tail. II. 134
A trust not within the statute of limitations. II. 145, 374
On a marriage settlement lands were conveyed in trust to the use of the trustees and their heirs, to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of the first, &c. son of the marriage in tail male; these limitations to the use of the husband for life, &c. are trusts only, not uses; and when the husband and wife levied a fine to a mortgagee to raise money, though the fine would have been a forfeiture of the wife's estate for life, had she had the legal estate, against which equity would not relieve, yet decreed that a trust-estate was not forfeited by a fine. II. 146
By a devise of all the rest of his real estate, an estate of which the testator was but a trustee passes. II. 198
Though where a copyhold is surrendered to the use of a will, there need not be three witnesses to such will; yet the trust of a copyhold cannot pass but by a will attested by three witnesses. II. 261
Quære autem, and see in the note a latter resolution to the contrary.
One buys an estate in the name of a trustee, who gives a bond in 200*l.* penalty to assign the estate as the *cestui que trust* or his executor should direct; *cestui que trust* dies, and his executor brings debt on the bond, recovers judgment, and has the money paid him; after which he brings a bill to have the conveyance of the estate; trustee decreed to convey to the plaintiff, and to account for the profits, but to discount, and be allowed the 200*l.* and interest which he paid. II. 314
A. seised in fee of lands demised the premises to trustees, *B.*, *C.*, and *D.*, for 500 years, in trust to pay debts, and for a charity; *B.*, one of the trustees, being in possession, and as a receiver appointed by the court, cuts down 1000*l.* worth of timber, *D.* one of the other trustees consenting; *B.* the trustee for the charity, or as receiver, ought not to take advantage of his having possession, without which he could not cut down the timber; yet the timber must be valued according to what it would be worth at the end of the term. II. 397
If a receiver of rents, or executor in trust, lays out the rents or the assets in a purchase of lands in fee, and dies insolvent, the purchase will not be liable: but where *A.* receives a sum of money, which he covenants to lay out in land to be settled to certain uses, and afterwards purchases an estate, which he does not settle, but does by writing own that this purchase was made with the trust-money, the same is a declaration of trust sufficient to bind the estate. II. 415
A. who is a trustee for *B.* of 1000*l.* *South-sea* stock, at the desire of *B.* borrows 4000*l.* on this stock of the company, and *B.* receives the money; *A.* pays the 10*l. per cent.* upon the late act 7 *Geo.* 1. to be discharged of the loan; though *B.* had forbid the payment, yet he is liable. II. 453
The court will not on motion or petition order an infant trustee to convey pursuant to 7 *Ann. cap.* 19. unless the trust appear in writing, but in such case will leave the *cestui que trust* to get a decree by bill. II. 549

Trust-estates are to be governed by the same rules of descent as legal estates. II. 713, 736

Where a judgment is given to a Papist, he cannot extend the land, for that would give him an interest in the land, contrary to the express words of 11 & 12 of *W.* 3. *cap.* 4., and it is the same thing where the judgment is given in trust for a Papist. III. 46 (N)

Trustee cannot change the nature of the *cestui que trust's* estate, by turning money into land, *et e converso.* III. 100

A breach of trust evidence of the greatest fraud. III. 131

A bare trustee is a good witness for his *cestui que trust;* but not an executor in trust, as he is liable to be sued by creditors, and to answer costs. III. 181

A trader in *London* having money of *J. S.* (who resided in *Holland)* in his hands, bought *South-sea* stock in his own name, but entered it in his account book as bought for *J. S.*; afterwards the trader became bankrupt; determined that this trust stock was not liable to the bankruptcy. III. 187 (N)

One makes his wife his sole heiress and executrix of all his real and personal estate, to sell and dispose thereof at her pleasure, to pay debts and legacies, and gives his brother (who was his next of kin and heir) 5*l.* The wife has the residue to her own use, and not as a trustee. III. 193

If a judgment be given in trust for a feme sole, who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over the extended interest. III. 200

Every executor is a trustee for the performance of the will. III. 205

Money agreed to be laid out in land shall be taken as land; and no difference whether it is deposited in the hands of trustees, or remains in the hands of the covenantor. III. 211

A trustee forbearing to do what it was his office to do, shall not prejudice his *cestui que trust.* III. 215

Every *cestui que trust*, whether a volunteer or not, is entitled to the benefit of the trust; and no reason that the trustee should keep the estate. III. 222

The wife of *cestui que trust* not entitled to dower. III. 229

Husband may be tenant by the curtesy of a trust. III. 234

The court never allow an executor or trustee for his time and trouble, especially where there is an express legacy for his pains, &c. III. 249

Nay, an executor in trust, who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused, but afterwards bargained with the residuary legatees, in consideration of 100 guineas, to act in the executorship; and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust money in their hands: but the demand was disallowed. III. 251, 252 (N)

Trustee compounds debts or incumbrances; who to have the benefit of it, see Composition, Debts, &c.

The devise of a trust to be construed in the same manner as that of a legal estate. III. 259

An executor or trustee for an infant neglects to sue within six years; the statute of limitations shall bind the infant. III. 309

A fine and five years' non-claim shall, in favour of a purchaser, bar a trust term, though the *cestui que trust* be an infant. III. 310 (N)

Where a bond is given to *B.* in trust for *A.*, the money due on the bond shall be paid in a course of administration; so if there be a term for years in *B.*, in trust for *A.* III. 342

A trustee misbehaving himself ordered to pay costs out of his own pocket, and not out of the trust estate. III. 347

Though, generally speaking, an executor or trustee compounding or releasing a debt must answer for the same; yet, if this appears to have been for the benefit of the trust estate, it is an excuse. III. 381

The statute of 7 *Annæ*, *cap.* 19. enabling infant trustees to convey, pursuant to the directions of the Court of Chancery, extends only to plain and express trusts, not to such as are implied or constructive only. III. 387

Lease of a coal-mine to *A.*, reserving a rent; *A.*, the lessee declares himself trustee for five persons, to each a fifth. The five partners enter upon, work, and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent; the *cestui que trusts* not liable, but for the time during which they took the profits. III. 402

In what Cases an Executor shall be only a Trustee, see EXECUTOR.

Resulting Trust, and Trust by Implication and Construction.

Father buys an estate in the name of a younger son and of a trustee, it shall be taken as an advancement; so though a reversion be settled on the younger son expectant on the mother's death, or though the father received the profits; provided it was done only as guardian, and during the son's minority. I. 111

Secus, if the father received the profits after the child's coming of age, and when of discretion to claim his right. I. 608

The statute of frauds and perjuries, which says that all conveyances, where trusts or confidences shall arise or result by implication of law, shall be as if that act had never been, must relate to equitable interests, and not to an use, which is a legal estate. I. 112, 113

A trust resulting by implication or construction may be rebutted by parol evidence. I. 113, 115

One devises lands to his executors (who are no relations) to sell for the best price, and to pay his debts, legacies, and funeral, so far as the same will extend, giving legacies to his heir at law, and 100*l.* to the children of one of his executors, but nothing to the executors themselves; decreed that the executors were but trustees for the heir at law after debts and legacies paid. I. 390

A grandmother buys an annuity in the 14*l. per cent.* lottery for 100*l.* in the grandchild's name; the child's father gives the grandmother a bond to repay the 100*l.* if the child dies before the grandmother, who receives the income and keeps the tally, the grandchild making no claim; this no trust for the grandchild. I. 607

One devises a rent-charge to be sold to pay legacies amounting to 800*l.*, and if the rent-charge shall sell for 1000*l.* then the testator gives a further legacy of 200*l.* The rent-charge sells for above 800*l.* and less than 1000*l.*, what exceeds the 800*l.* shall belong to the heir as a resulting trust. III. 252

Trust for raising Portions and Payment of Debts.

A trust-term is raised to pay all debts equally, and the party dies indebted by bond and simple contract; the bond-creditors may be paid part of their debts out of the personal estate, and shall nevertheless come in upon the trust-term for the remainder equally with the simple contract creditors. I. 228

Where a trust is raised to pay debts, this is like a mortgage, and the simple contract debts shall carry interest. I. 229

Where there is a power to charge lands for portions for younger children living at their father's death, a posthumous child is within the power. I. 245

Where the trust of a term was to raise portions out of rents and profits, to be paid as soon as conveniently might be; by virtue of the word *profits* the trustees were held to be impowered to sell or mortgage; *secus*, if said *annual* profits. I. 415

One devises lands to his wife for life, and after her death to his son in fee, upon condition to pay his daughter 1000*l.* within a year after the death of *J. S.* provided, if the money be not paid, the daughter may enter and receive the profits till payment;

J. S. dies living the wife; the daughter shall have the 1000*l.* during the life of the mother, and in default of payment equity will decree a sale of the reversion. I. 478

Where a trust was created for a provision for daughters *to be* born, this was held to extend to daughters *then* born. I. 426

One devises his lands for payment of his debts; bond and simple contract debts shall be paid equally: but if he only charges his lands with the payment of his debts, so that the lands descend subject to the debts, the bonds shall be preferred to the simple contract debts. I. 430

But if the heir sells the land before any action brought, then both to be paid equally. I. 431

One devises all his *real estate* to pay debts, having part freehold and part copyhold, and dies without having surrendered the copyhold to the use of his will; regularly the copyhold shall not pass without being mentioned; and if not mentioned, equity will on behalf of creditors supply the want of a surrender: but if the freehold estate be not sufficient to pay the debts, the copyhold, being real estate, shall be liable. I. 443

A term was created for raising daughters' portions commencing after the death of the father and mother, upon trust to raise the portions from and after the commencement of the term; father dies leaving a daughter; decreed the portion was vested, but not raisable during the life of the mother. I. 448

Baron gives feme the foul distemper, *A.* lends the wife 30*l.* to pay the doctor for her cure; baron devises lands for the payment of his debts; this 30*l.* is a debt of the husband's, and *A.* a creditor in the doctor's place. I. 482

One devises lands to his executors until his debts paid, the remainder over, the executors misapply the profits; they shall hold only until they might have paid the debts by the produce, after which the lands are to be discharged, and the executors only to be liable. I. 518

One borrows money during his infancy, and applies it to the buying of necessaries; afterwards coming of age, he devises his lands for the payment of his debts; this debt contracted during infancy is within the trust. I. 558

The trust of a term was to raise portions for daughters by sale or mortgage, rents, issues, or profits, and to be paid at the daughters' ages of twenty-one, or marriage, if after fourteen, or under, if with consent of the mother; the mother dies leaving four daughters; the eldest after the age of fourteen married, and with her husband brought a bill for the raising of her portion in the life-time of the father; court decreed a sale of the reversionary term for the raising thereof. I. 707

If in a trust-term for raising daughters' portions a particular method of raising them be directed, this implies a negative that they shall not be raised any other way; as where it was to raise the portions out of rents, issues, and profits, as well by leasing for three lives or twenty-one years, at the old rent; it was held to extend only to raise the portions by annual profits, or by leasing, and not by mortgage or sale; and if the trustee mortgages for the portion, the mortgage is void, when the portion might have been raised by the profits. II. 14

The natural meaning of the word *profits* when used in provision for children's portions, and upon what occasion the sense has been enlarged. II. 19

Where a portion is to be raised by annual profits or fines, if no time be appointed, the portion is not due till such time as it might be raised. II. 20

The trust of a term was for raising of a portion for a daughter in default of issue male, payable at eighteen or marriage, or as soon afterwards as the same might conveniently be raised; the mother died leaving no son, and only one daughter; the court was of opinion that the portion could not be conveniently raised by sale of the reversion. II. 93

Where there is a power in the trust-term

to raise portions for the husband, with consent of the trustees, to revoke all the uses, this suspends the vesting of the portion. II. 101

In a marriage settlement a term for years for securing younger children's portions is by mistake made subsequent to the estate-tail limited to the sons; this helped in equity. II. 151

A reversionary term for raising maintenance and portions for daughters shall, in case of necessity, be mortgaged to pay either, and when fallen into possession shall pay all the arrears of maintenance incurred before it came into possession. II. 179

One devises lands to trustees in fee, in trust to apply the profits thereof until sale for the benefit of all his four children, and the survivors and survivor of them equally, and on farther trust, that as soon as the trustees shall see necessary they shall sell the premises, and apply the money for the benefit of his four children equally, to be paid at twenty-one or marriage; *A.* the eldest of the four children attains twenty-one, marries, dies without issue intestate, and leaving a wife; decreed that the lands being in all events devised to be sold, though the time for sale was left to the executors, was personal estate, and *A.*'s widow must have a moiety of his share, and that the profits of the land until sale must go as the money arising upon sale would. II. 320

One owing a debt by simple contract barred by the statute of limitations, devises lands in trust for payment of his debts; this debt, though barred by the statute, is revived by the will. II. 373

One devises his lands in *D.* to *A.*, his cousin an infant, at her age of twenty-one, subject to the incumbrances thereupon, the rents during the infancy to be paid to her father, and devises all his other lands to trustees to pay his debts, the lands in *D.* being mortgaged; this mortgage shall be discharged by monies arising from the sale of the other lands. II. 386

If a devise be to executors of an equity of redemption only for payment of debts, this is but equitable assets, and to be applied to pay all sorts of creditors equally. II. 416

A. devises all his real and personal estate to his executors and their heirs, in trust to sell and pay all his debts; his real estate being only equitable assets and the testator leaving debts by bond and simple contract, if the bond creditors are paid part out of the personal estate, they shall bring it back again into hotchpot, or shall not have any thing out of the real estate. *ibid.*

The testator's heir at law who opposed the will as to part of the land devised thereby, yet being a creditor was let in to the residue of the fund created by the will for payment, &c. II. 418

Husband by marriage settlement secures a portion for daughters of the marriage in default of issue male; there is one daughter only, the husband survives that wife, and marrying again, leaves issue by the second wife, and dies intestate, the daughter by the first marriage being an infant, and her portion not then due; if the daughter lives till the portion is due, it is an advancement *pro tanto*, and must be brought into hotchpot as to the other issue. II. 435

Portions secured by settlement out of land, or articled so to be, are not to be paid out of the personal estate. II. 437

Upon a marriage settlement lands are limited to the use of the husband and wife for their lives, remainder to their first and every other son in tail, and in default of issue male of the marriage, to raise 2500*l.* for daughters payable at twenty-one or marriage, which should first happen, and out of the profits to pay 100*l. per annum*, for maintenance; the first payment of the maintenance to commence after the estate of the trustees shall have come into possession; husband dies without issue male, leaving a daughter and a wife, who is jointured in the premises; the portion shall not be raised in the mother's life-time, because the maintenance which is naturally to precede the portion is not to

be paid till the trustees are in possession. II. 484

Where there is a devise of lands to executors, to pay debts and legacies, the debts to be preferred; for this being legal assets, payment must be in a course of administration; *secus*, in case of a bare trust to pay debts and legacies. II. 550

Quære tamen.

A term of 500 years is created to raise portions for daughters, in failure of issue male, as soon as conveniently may be after the father's death, but no maintenance, nor any express time mentioned when the portions are payable; there are three daughters, and the eldest but eight years old; the father is dead, but the mother, who has a jointure on the estate, is living; the court will not raise the portions for the daughters so young out of the reversionary term. II. 659

Portions secured by a trust-term payable to daughters, to be raised by rents and profits, and no time limited for payment, shall carry no interest, and be raised only by perception of profits, not by sale or mortgage. II. 666

The word *portion* does not *ex vi termini* imply a sum in gross, and to be paid all at once. II. 669

The trust of a term is to raise daughters' portions by rents, issues, and profits; or by making leases for three lives at the ancient rent; or by granting copyholds on fines; the money to be paid to the daughters at their age of eighteen, or marriage, or as soon after as the same can be raised out of the premises aforesaid; the portions, as it seems, cannot be raised by the sale or mortgage. III. 1

In a devise of lands to pay debts, if the creditors bring a bill to compel a sale, the heir is, generally, to be made a party; *secus*, of a trust created by deed to pay debts. III. 92

In the case of a deed of trust to pay debts, the sanity of the grantor is not proved; *secus*, where a bill is brought to prove a will of land. III. 93

One by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by will; the copyhold, though not surrendered to the use of the will, shall yet be applied to the payment of the debts *pari passu* with the freehold. III. 96

If I charge all my lands with payment of my debts, and devise part to *A.* and other part to *B.*, &c. the creditors cannot be paid out of the lands till the master has certified what the proportion is, which each devisee is to contribute: but if the master certifies that the debts will exhaust the whole real estate, then the creditors may proceed against any one devisee for the whole. III. 98

Term of one thousand years to secure daughters' portions, payable at sixteen; provided, if no daughter at the time of failure of issue male, the portion to sink. There is a daughter who attains to sixteen, and marries without consent, and no son by the marriage; but the daughter dies in the life-time of the father and mother, and consequently while there might be a son; the portion sinks. III. 134

In a settlement a term was raised for daughters' portions, *viz.* 10,000*l.*, with a proviso, that if the father by deed or will should give or leave the sum of 10,000*l.* to his said daughters, it should be a satisfaction; the father leaves land to the daughters of the value of 10,000*l.*, this no satisfaction. III. 245

A trust estate was decreed to be sold for the payment of debts and legacies, and to be sold to the best purchaser. *A.* articles to buy the estate of the trustees, and brings a bill to compel them to perform the contract; the court will make no new decree, but leave the former decree to be pursued. III. 282

See also PORTIONS OR PROVISIONS FOR CHILDREN, WILL.

Trustees for preserving contingent Remainders.

Trustees for preserving contingent remainders join in a conveyance before the birth of a son; this is a breach

of trust against which equity will relieve. I. 128

Trustees for preserving contingent remainders in a voluntary settlement, decreed to join in a sale for payment of debts. I. 358

A settlement was made by a third person to the use of the husband for ninety-nine years, remainder to trustees during his life, &c. remainder to the wife for life, remainder to the first, &c. son of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband; there was no issue of the marriage, and the trustees joined in cutting off the remainders; yet the court refused to punish them at the suit of a remote remainder-man. I. 359

A. settles lands to the use of himself for ninety-nine years, if he should so long live, remainder to trustees during his life, &c. remainder to the heirs of his body, remainder to *A.* in fee; *A.* has two sons, and he, the trustees and the eldest son, join in a mortgage by feoffment; the eldest son dies without issue: the second son, during the life of the father, has no pretence to set aside the mortgage, though this seems a breach of trust in the trustees. I. 387

In a marriage settlement the husband is made tenant for ninety-nine years, if he so long live, remainder to trustees during the life of the husband, remainder to the first, &c. son of the marriage in tail male, remainder to the first, &c. son by any other wife, remainder over; a son is born and of age, the wife dead, and there are no other sons by a second marriage, the trust for preserving contingent remainders descends to an infant; if for the benefit of the family, equity will decree the infant trustee to join in a recovery. I. 536

On marriage lands are settled on *A.* for ninety-nine years, if he so long live, remainder to *B.* and his heirs, during the life of *A.*, to support contingent remainders, remainder to the first, &c. son of *A.*, who has issue two sons *C.* and *D.* *A.* the father having mortgaged the premises, he and his son *C.* covenant to suffer a recovery, and to procure the trustee to join, who by answer submits to the court; court will not compel the trustee to join, unless *D.*, the second son of the marriage, will consent. II. 379

Trustees for supporting contingent remainders joining to destroy them are guilty of a breach of trust; and no diversity, whether the settlement be voluntary, or for a valuable consideration, or by will only. II. 678

And in such case, if the persons claiming under the breach of trust have notice of it, they are subject to the same trust; so if the conveyance be voluntary, or without a valuable consideration: but if for a valuable consideration, and without notice, the purchaser will hold the lands discharged, and the trustees must buy and settle other lands to the same uses. II. 681

Sir *P. T.* tenant for life, remainder to his son *R. T.* for life, remainder to his first, &c. son in tail. Sir *P. T.*, by indenture *tripartite*, between himself of the first part, *R. T.* of the second part, and *J. S.* of the third part, covenanted to levy a fine of the premises. But *R. T.* did not join in any covenant in the deed, nor in the fine, but sealed the deed; determined, that this was no surrender, in regard the remainder-man cannot surrender, but only release to the tenant for life. And the bare sealing the deed by *R. T.* the son would neither surrender nor release his estate; consequently, the contingent remainder to the first, &c. son was preserved, there being a right of freehold subsisting in *R. T.* the son, for the supporting of this right. III. 210 (N)

Trustee, when and how to be charged and discharged, and what Allowance to have.

Two trustees in a mortgage join in an assignment of the term, and in a receipt for the whole, each receiving a moiety only of the mortgage money; to be answerable only for what they respectively receive. I. 81, 241

Otherwise where executors join in sales, there being no necessity for their so doing. I. 83

Captain of a ship dies leaving money on board, the mate becomes captain and improves the money; he shall, on allowance made to him for his care of the management of such money, account for the profits, and not for the interest only. I. 140

Where an executor puts out money, though without the indemnity of a decree, upon a real security, which there was no reason then to suspect; but afterwards such security proves bad, he is not accountable for the loss, any more than he would have been entitled to the profit, had it continued good. I. 141

10,000*l.* trust money being agreed to be laid out in land, and settled in the common form of marriage settlements, is employed in buying *South-sea* stock, and improved to 30,000*l.*; as the trust would have suffered by the fall, so shall it have the benefit of the rise of the stock. I. 648

U. V.

VALUATION.

Where a covenant was to settle lands, (without mentioning any lands in certain) this no specific lien, but the wife decreed to come in as a creditor in general, and to be entitled to what the master should value her estate for life at, but she to have the arrears before incurred, as well as the valuation of her estate for life. I. 429

Tenant for life, remainder to the first son in tail, remainder to the father in fee; father's interest valued but at one third, and the estate tail of the son (though an infant) at two thirds. I. 650

VENIRE FACIAS.

See Writs.

VERDICT.

In some cases equity relieves after a verdict at law, and where the plaintiff in equity might properly have defended himself; as where a receipt from the plaintiff at law is found after the verdict. II. 426

In all indictments against one for being accessary after the fact, by receiving, harbouring, &c. a felon, it is necessary to charge, that the defendant knew the principal was guilty or convicted of felony; and the omission of this necessary ingredient is not to be helped by the finding of the verdict; especially if the verdict does not find the fact of notice, but only what is evidence thereof. III. 493

Where a special verdict has not certainly found any felony upon the facts therein stated, and consequently it is uncertain whether the prisoner be guilty of any felony at all, or only of a misdemeanor; or where the jury has found a general verdict that the prisoner is guilty, and afterwards judgment is arrested for defects in the indictment; in these cases the judgment given must be judgment of acquittal; but this will be no bar to another indictment constituting a different offence. III. 499

And see Judge and Jury, Trial.

VISITOR AND VISITATORIAL POWER.

Where the king is founder, in that case his Majesty and his successors are visitors: but where a private person is founder, there such private person and his heirs are by implication of law visitors. II. 326

But though in the latter case the visitatorial power results to the founder and his heirs, yet it may be by him vested or substituted in any other person. *ibid.*

Where governors or visitors are said not to be accountable, it must be intended where such governors have the power of government only, and not where they have the legal estate, and are entrusted with the receipt of the rents and profits. *ibid.*

The word *governor* does not of itself *et ex vi termini* imply visitor. II. 327

VOLUNTARY.

A voluntary conveyance to the brother of the half blood, but which was void and defective at law, made good by a court of equity against the heir. I. 60

Vide autem, where it is said a voluntary conveyance of a copyhold, or other estate, is not to be helped in equity against the heir. I. 354

A freeman of *London* signs a note, by which he owns himself indebted in 5000*l.* to his brother and heir, but the brother knows nothing of it; the freeman keeps this note always in his own custody, and on his death it is found among his papers; adjudged a void note, and as a matter intended and not perfected. I. 204

Trustees to preserve contingent remainders in a voluntary settlement decreed to join in a sale for payment of debts. I. 358

A. makes a voluntary settlement on her nephew, keeping the deed in her power, in which settlement there is no power of revocation; afterwards one secretly and by fraud, on behalf of the nephew, gets an attested copy of this settlement, and then the party who made the settlement burns it and settles the premises on another nephew, delivering to him the second settlement; the first nephew's bill to establish the copy of the first settlement dismissed with costs, and the attested copy ordered to be delivered up to the second nephew; for though of two voluntary settlements, the first shall take place, yet this is not so where any fraud has been used in gaining the first settlement, or a copy of it. I. 577

Or if the first was made absolute against the intention of the party. I. 581

Where money is agreed to be laid out in land, though the contract be voluntary, equity will enforce an execution thereof in favour of the heir. II. 171

A. seised in fee, on his marriage covenants to settle the premises on himself and his wife, and the issue of the marriage, remainder on his nephew in fee; the remainder is voluntary, and not supported by the consideration of that marriage, or of the marriage portion. II. 255

A. the father and *B.* the son, on the marriage of *B.*, article to settle lands on *B.* and his wife for their lives, remainder to their issue, remainder to the nephew in fee; if *A.* had the sole interest, the limitation to the nephew is voluntary; *secus*, if the father and son had each some interest. II. 256

If a parent makes a voluntary conveyance in trust for his children, and keeps it in his own power, or in the hands of his agent, and this is got from him, it ought not to bind him: but where a feme having issue by her first husband, makes a suitable provision for them before her treaty for a second marriage; this is good, and not liable to be avoided by a second husband. II. 358, 674

Feme seised of a copyhold, on marriage of her daughter to *J. S.*, surrenders it to the use of *J. S.* and his intended wife, and the heirs of their bodies, remainder to *J. S.* in fee; the marriage takes effect, the husband signs a writing, whereby he owns that the limitation of the remainder in fee to him was a mistake, being intended for the wife, and accordingly covenants to stand seised of this remainder in trust for the wife in fee; this not a mere voluntary covenant, and equity will compel the performance of it. II. 464

Every *cestui que trust*, whether a volunteer or not, is entitled to the benefit of the trust. III. 222

Any voluntary bond is good against the executor, though to be postponed to a simple contract debt. *ibid.*

A husband voluntarily, and after marriage, allows the wife for her separate use, to make profit of all butter, eggs, &c. beyond what is used in the family; out of which the wife saves 100*l.*, and lends it to the husband. After the husband's death, the court will, in order to encourage the wife's

frugality, allow of this agreement, and let her come in as a creditor for this 100*l.*, especially there being no defect of assets to pay debts. III. 337

A. having a wife who lived separate from him, courted, and afterwards married another woman, who knew nothing of the former wife's being alive. But this being afterwards discovered, in order to induce the second wife to continue to live with him, *A.* gave a bond in trust to leave her 1000*l.* and died, not leaving assets to pay his simple contract debts; this bond held to be worse than voluntary, being given on an illicit consideration, and postponed to all the simple contract debts. III. 339

And see FRAUD.

USE.

One seised in fee as heir of the mother's side levies a fine, and declares the use thereof to himself in fee; this is the old use, and no diversity betwixt an express declaration of an use, and one implied. II. 139

And see TRUST.

W.

WARD.

See GUARDIAN.

WASTE.

Lord of a manor may bring a bill for an account of ore dug, or timber cut, by the defendant's testator; otherwise of plowing up meadow or ancient pasture, or such torts which die with the person. I. 406

Lessee for years, *sans* waste, remainder in fee to a bishop; lessee enjoined from digging the ground for brick. I. 527

One in consideration of marriage settles an house to the use of himself, *sans* waste, remainder to his first, &c. son; the tenant for life shall not pull down the house. I. 528

Hard that lessee for years, *sans* waste, should enjoy the trees or materials of the house when he pulls it down, the intention of that clause only being that the lessee for years should be as free from waste as he was before the statute of *Gloucester*. I. 528

And see TIMBER.

WIFE.

See BARON AND FEME.

WILL.

There is a difference between wills and conveyances at law as to their construction, and why. I. 20

A will cannot operate as a release. I. 85

Though a will cannot speak or take any effect until the testator's death, yet it is inchoate, though not consummate, from the execution of it, and to many purposes in law relates to the time of the making. I. 97

Devise of a personal estate to a feme covert for her separate use, without naming trustees; *quære* whether good to bar the husband. I. 125

A will of land may be good at law, as being well executed, and yet ill in equity, as if obtained by fraud. I. 288

One being on shipboard, and entitled to part of a considerable leasehold estate by the death of his father, which he did not know he had a right to, made his will at sea, and devised to his mother, if living, his rings, making *A.* his executor, to whom he bequeathed his red box, and *all things not before bequeathed*; this held not to pass the leasehold interest, or what the testator did not know he was entitled to, but to be restrained to things *ejusdem generis*. I. 302

One devises the surplus of his personal estate to his relations; only such shall take who are capable of taking within the statute of distribution. I. 327

One devises the surplus of his estate to his *poor* relations, how construed, *et quære*. *ibid.*

One devised the surplus of his personal estate to his children and grandchild-

ren; a grandchild *en ventre sa mere* at the testator's death shall not take: *secus*, had it been to the children and grandchildren living at his death. I. 342

And such children and grandchildren shall take *per capita*, not by way of representation. I. 343

Devise to *A.* and his issue, remainder to *B.* and his issue, remainder to the heirs of *A.* *A.* dies without issue in the life of the testator; *B.* dies in the life of the testator, leaving issue, who is also the heir of *A.*; the issue shall not take an estate-tail as issue of *B.*, nor the remainder in fee as heir of *A.* I. 397

Devise to *A.* for life, remainder to *B.* for life, remainder to the right heirs of *A.* *A.* dies in the testator's life-time; his right heirs shall never take. I. 399

Where a real estate is by a will charged with the legacies *above mentioned*, this will not extend to the legacies in the codicil; *secus*, if the lands were charged with the payment of the legacies generally. I. 423

Where a will was wrote blindly and hardly legible, and the legacies in figures, the court referred it to a master to examine what those legacies were, with directions that he should be assisted by such as understood the art of writing. I. 425

In case of a will where the remainder is devised in contingency, the reversion in fee is not in abeyance in the mean while, but descends to the heir. I. 516

Where by a will money is to be paid by executors as the testator by deed shall appoint, and the testator afterwards makes a deed of appointment; this deed referring to the will shall be held as part thereof. I. 530

Diversity betwixt a devise of a real estate and the devise of a personal estate; as if I devise all my real and personal estate, and afterwards purchase more of each kind: only the personal estate that is purchased afterwards shall pass, and why. I. 575

One devises 500*l.* to the church of St. *Helen*, *London*; this is good, and belongs to the church-wardens to be employed in the repairing and adorning the church. II. 125

A will says in the beginning *after testator's debts and legacies paid*, and then gives several legacies and portions to the testator's daughters, and then says, that *after legacies paid* the surplus of the personal estate shall go to the son; after which follows a devise of lands to the son, but if he dies without issue in the life of any of the daughters, then to the daughters; there is out of the personal estate sufficient to pay a great part, though not all of the legacies; in such case, the deficiency is not chargeable upon the land. II. 187

A. possessed of a term for 500 years in *Black-acre*, afterwards purchases the fee-simple in *B.'s* name, and devises *Black-acre* to *J. S.* in fee, but the will is not attested by three witnesses; the term shall not pass, because attendant on and part of the inheritance. II. 236

There is a diversity betwixt a deed and a will gained from a weak man, and upon a misrepresentation, in regard equity will set aside the former, but not the latter. II. 270

In the exposition of wills, every word shall have its effect, and not be rejected, if by any construction it can have its effect. II. 282

On a bill brought to set aside a will of a personal estate for fraud, the court will deny an injunction. II. 287

Where one gives by will a debt which is owing to him, this cannot in strictness operate as a release. II. 332

A devise of the residue of a personal estate to three is a joint devise, and shall survive. II. 347

One having had five children *A.*, *B.*, *C.*, *D.*, and *E.*; *B.* is dead leaving several children, and by will the testator devises the residue of his personal estate to his son *A.*, and to *B.'s* children, and to his daughter *C.*, and *D.'s* children, and to his daughter *E.* *D.* is living and has children; decreed the children of *B.* and the children of *D.* shall take *per capita*,

and not *per stirpes*, as if all had been named. II. 383

One seised in fee, and possessed by lease for twenty-one years of lands in *D.*, devises all his lands whereof he is seised, possessed, or any ways interested in, to *A.* for life, remainder to *B.* in tail, remainder to *C.* for life, with power to make a jointure, remainder to trustees to preserve contingent remainders, &c., decreed the leasehold should pass, as well as the freehold. II. 456

Whatever is given by a will is *primâ facie* to be intended a benevolence. II. 616

In a will, where the intention is plain, that ought to control the legal operation of the words. II. 741

In some sense the statute of distribution makes a will for the intestate, *viz.* by so far vesting the distributory share in the person entitled, as that though he should die immediately after the intestate, it will be transmissible to his representatives; just as if one entitled to a legacy payable at a future time, should die before the time of payment, the legacy would notwithstanding be an interest vested presently. III. 49, 50 (N)

Where a bill is brought to prove a will of land, the sanity of the testator must be proved: *secus*, in the case of a deed of trust to sell for payment of debts. III. 93

The court never orders a will to be proved *viva voce* at the hearing, as they do a deed. *ibid.*

Devise of all my household goods, plate, &c. to *A.*, the residue of my personal estate to *B.* The ready money and bonds do not pass by the word *goods*, for then the bequest of the residue would be void. III. 112

A will coming into *Westminster Hall* ought to be construed according to the rules of the common law. III. 115

One articles to buy land, and the title is under a will not proved in equity against the heir; yet in some cases equity will compel the purchaser to accept the title. III. 190

Though it be proper to prove a will in equity, yet the same is not absolutely necessary, any more than it is to prove a deed in equity. III. 192

Where the testator owns his hand before the witnesses who subscribe the will in the testator's presence; the will is good, though all the witnesses did not see the testator sign. (See title *Witness to a Will.*) III. 254

Where a title depends on the words of a will, this is as properly determinable in equity, as by a judge and jury at *nisi prius*. III. 296

An equity of redemption of a copyhold may be devised without being surrendered to the use of a will. III. 358

See also Exposition of Words.

How far Parol Proof may be admitted to explain a Will.

See Evidence.

Probate.

An executor proves a will of a personal estate wherein one of the legacies is forged, the executor has no remedy in equity, but ought to have proved the will, with a special reservation to that legacy. I. 388

A will is made in *French*, and the probate in *English*, and varies from the original; the probate being in a different language is not conclusive. I. 526

An executor cannot bring a bill without shewing thereby that he has proved the will in the spiritual court: if he does, this is good cause of demurrer; but it is enough to allege that he has duly proved the will, without saying in what court. I. 752

If an executor brings a *scire facias* to revive a decree, he must shew he has proved the will; and where there are *bona notabilia* in divers dioceses, if he shew proof of the will in the spiritual court of one of the ordinaries, this is not good; but in such case the proof must be in the archbishop's court. I. 766

A. dies indebted by one bond to *B.*, and by another bond to *C.*, and leaves *B.* and *J. S.* executors: *B.* intermeddles with the goods, and dies before probate, and before any election

made to retain; *Qu.* Whether as *B.* might have retained the goods in his hands, his executors have not the same power? III. 183

Where an executor, before probate, files a bill, and afterwards proves the will, such subsequent probate makes the bill a good one. III. 351

A *donatio causa mortis*, though in nature of a legacy, need not be proved with the will. III. 357

Nuncupative Will.

Devise by a nuncupative will by tenant in tail of rent out of land to a charity void, though the will was made before the statute of frauds. I. 247

Witness to a Will.

A child of a residuary legatee no witness to prove a will relating to a personal estate, by the civil law, by which law only such will is determinable. I. 10

One of the witnesses to a will is devisee of part of the land. *Quære*, if not a good witness if he aliens the land without covenant or warranty. I. 557

A witness proving a will of land, swears that he subscribed it in the same room, and at the testator's request; this held good, though not said in the testator's presence. I. 740

A witness to prove a will of lands ought properly to prove that the will was executed in his presence, and also in the presence of the two other witnesses, and that they subscribed in the presence of the testator. I. 741

Where there is a power to appoint an use of land by deed or will, a will attested by two witnesses not a good appointment; because in such case by a *will* must be intended such a will as is proper to dispose of land; so though the words are, *or other writing in nature of a will.* I. 741, 742

The statute of frauds and perjuries, which requires that a will of land should be subscribed by three witnesses in the testator's presence, not binding in *Barbadoes.* II. 75

A bill to perpetuate the testimony of witnesses to a will, if brought to hearing, to be dismissed with costs; notwithstanding which the plaintiff may at law have the benefit of the depositions. II. 162, 163

A trust of lands is limited to *A.*, his heirs and assigns, or to such as he shall appoint; *A.* devises these lands by will attested but by two witnesses; the will is void, and shall not operate as an appointment. II. 258

A copyhold surrendered to the use of a will shall pass by a will attested by two witnesses, or by one only. *ibid.*

But a trust or equity of redemption of a copyhold cannot pass by a will, unless attested by three witnesses. II. 261

Quære autem, and see in the note a latter resolution to the contrary.

Wills made beyond sea of lands in *England* must be attested by three witnesses. II. 293

Where there are three witnesses to a will of lands, two whereof swear that the will was signed by the testator in the presence of all the three witnesses, but the third swears, that the testator having written and signed his will before called for the witnesses, and declared the writing to be his last will, and that all the three witnesses were then present, and subscribed their names in his presence; *Qu.* Whether this will be good to pass the land? II. 509, 510

Where the testator owns his hand before the witnesses who subscribe the will in the testator's presence, the will is good, though all the witnesses did not see the testator sign. III. 254

Difference observed with regard to the statute of frauds, which does not say, that the testator shall sign his will in the presence of three witnesses, but requires these three things; 1st, That the will should be in writing; 2dly, That it should be signed by the testator; and, 3dly, That it should be subscribed by three witnesses in the presence of the testator. *ibid.*

See also WITNESS, EVIDENCE, DEPOSITION.

Revocation of a Will.

Subsequent marriage, and having children, construed a revocation of a will. I. 304

A will, or writing revoking a former will, must be subscribed by three witnesses: but this need not be in the presence of the testator. I. 343

A void will or codicil, though there be a clause of revoking all former wills, will not, however, operate as a revocation. I. 344

Cancelling a former will by mistake or on a presumption that a latter will is good, which proves void, will not let in the heir. I. 345

One makes duplicates of his will, and cancels one of the duplicates; this is a revocation of the whole will. I. 346

A. has two daughters, *B.* and *C.*, and devises one moiety of his real estate to *B.*, the other moiety to *C.*, after which, in consideration of marriage, he covenants to settle a moiety of his real estate upon the husband of *B.*, this covenant being for a valuable consideration, is in equity a revocation of the will, so that the husband shall have one moiety of the real estate by the settlement, and the wife a moiety of the other moiety by the will. II. 332, 624

One makes his will of land, and afterwards by deed and fine mortgages; this a revocation *pro tanto* only. II. 334

Tenant in tail-male, remainder to himself in fee, devises his lands to *J. S.*, and then suffers a recovery to the use of himself in fee, and dies without issue male; this is a revocation of the will. III. 163

Where the spiritual court set aside a will as revoked by the testator, this sentence could extend only to the personal estate disposed of by such will. III. 166

One seised of a lease for lives devises it, and afterwards renews; the renewal is a revocation of the will. *ibid.*

Secus, as it seems, in the case of a lease for years. III. 166

A. and *B.*, tenants in common of lands in fee. *A.* by will dated 25 *January*, 1719, devised his moiety in fee. Afterwards *A.* and *B.* made partition by deed dated 16th *May*, 1722, and fine, declaring the use as to one moiety in severalty to *A* in fee, and as to the other moiety in severalty to *B.* in fee; this deed of partition and fine no revocation of the will of *A.* III. 169, 170 (N)

Where a subsequent conveyance does not revoke a will. III. 346

Will Suppressed by the Heir.

See Deed.

Devise and Devisee.

A. devised lands to trustees and their heirs, in trust that the profits should be equally divided between his wife and daughter (the heir of the testator) during the wife's life, and after her death he devised the same to the use of the daughter in tail, remainder over; the daughter died before the mother without issue and intestate; this held to be a tenancy in common between the mother and daughter, and that on the daughter's death her moiety did not result to the heir, but was an interest in nature of a tenancy *pur autre vie*, which by the statute of frauds and perjuries belonged to the daughter's administratrix. I. 34

No estate raised by implication in a will can destroy an express estate; as where a devise was to *A.* for life, remainder to his first son, and so to every other son in tail male, and *for want of issue male of A.*, remainder over; this gave no estate-tail in *A.* by implication. I. 54

One devises lands for the payment of his debts, and then to *A.* for life, with power to make leases, &c. remainder to the heirs male of the body of *A.*; though this be but the devise of a trust and executory, and expressed to be to *A.* for life, yet it is an estate-tail in *A.*, barrable by a fine and recovery. *Secus*, had it been the case of marriage articles. I. 142

See also 290

Devise to the testator's wife for life,

and then to be at her disposal, provided it be to any of his children; this gives the wife an estate for life, with a power to dispose of the fee. I. 149

One devises all his freehold houses in *A.*, and has none but leasehold houses there, the leasehold shall pass; *secus*, in a grant. I. 286

Devise of lands to a corporation in trust to convey the premises to the testator's godson *A.* for life, and so to his first son for life, and afterwards to the first son of that first son for life, then to *B.* for life, with the like limitations; this tending to a perpetuity will not be allowed, but the conveyance shall be made as near the intent of the party as the rules of law will admit, *viz.* by making all the persons in being only tenants for life, but the limitation to the sons unborn must be in tail. I. 332

Where one devises his lands for the payment of his debts, bond and simple contract debts shall be paid equally: but if he only charges his lands with the payment of his debts, so that they descend subject to the debts, the bonds shall be preferred to the simple contract debts. I. 430

But if the heir sells the land before action brought, then both to be paid equally. I. 431

One devises lands to his wife for life, and after her death to his son in fee, upon condition to pay his daughter 1000*l.* within a year after the death of *J. S.*, with a proviso, that if the money be not paid, the daughter may enter and receive the profits till payment; *J. S.* dies, living the wife; the daughter shall have the 1000*l.* during the life of the mother, and in default of payment, equity will decree a sale of the reversion. I. 478

One devises his estate, in case he leaves no son at the time of his death, to *J. S.*; the testator dies, leaving his wife *privement ensient* with a son; this posthumous son is a son living at the testator's death, and *J. S.* not entitled. I. 486

One devises lands to his younger sons at twenty-four, and in the mean time the rents and profits of the premises to his eldest son and dies; the eldest son devises all those rents and profits of the premises to his younger brothers, but not to be paid to them until twenty-four; only the rents and profits accruing from the death of the elder brother shall pass. I. 500

So if one possessed of a term for years devises all the profits thereof to *J. S.*, only the profits accruing from the death of the testator shall pass. I. 503

Devise to *A.* for life, remainder to the right heirs of *J. S.* who is then living; the fee-simple descends to the heir at law of the testator, till the contingency happens. I. 511

By a devise of a house *cum pertinentiis*, only the garden and orchard will pass with it: but by a devise of a house *with the land appertaining thereto*, the land usually occupied therewith will pass. I. 603

One devised that his cousin *A.* should continue to live at his house, and be at the charge of keeping it, and the servants and coach-horses which the testator employed in plowing the ground, and spend the corn arising thereon in the house; here the land enjoyed with the house shall pass to the cousin. *ibid.*

One devises a house, and directs by will, that an annuity of 1200*l. per annum* be paid to his cousin, and that she shall maintain her son there; the son chooses to go from her; still the cousin shall have the 1200*l. per ann.* in the same manner as if the son had died. I. 604

In a devise of land to *A.* for life, and if *A.* die without issue, then to *B.*, though here is an express estate for life to *A.*, yet the subsequent words will turn it into an estate-tail; but where lands are devised to *A.* for life, remainder to trustees, &c. remainder to his first, &c. son in tail male, &c. and if *A.* dies without issue, then, &c. this will not give an estate-tail to *A.*, but the words [without issue] must be intended to be without *such* issue. I. 605

One devises his estate to trustees and their heirs, in trust to convey the premises to *A.* for life, remainder to his first, &c. son in tail male successively, remainder to his daughters in tail general, and if *A.* should die without issue, then the premises to be settled on *B.*, *C.*, *D.*, and *E.*, to each one fourth in fee, and in case any of the four remainder persons die without issue, the trustees to convey such fourth part in fee to the respective heirs of the person so dying; one of the persons dies without issue, her fourth in equity belongs to her brother as her heir. I. 606

Two schools in the same town, one a free school, and the other a charity school for boys and girls; *A.* devises 500*l.* to the charity school; though both be charity schools, yet only that for boys and girls shall take. I. 674

J. S., after a devise of several parts of his real and personal estate to several persons, devises the interest and produce of the surplus of his real and personal estate to his grandchildren, until their ages of twenty-one; this will pass the absolute right and property of the real and personal estate to the grandchildren after that age. II. 194

By a devise of all the rest of his real estate, an estate of which the testator was but a trustee passes. II. 198

A trust of lands is limited to *A.* his heirs and assigns, and to such as he shall appoint; *A.* devises these lands by a will attested but by two witnesses, the will void, and shall not operate as an appointment. II. 258

Devise that if *cestui que vie* of a church lease which the testator had should die, the testator's executors should purchase the premises for the life of *J. S.*, the testator's kinsman; but if such purchase could not be made, then the surplus of the personal estate to go to another: the purchase was made accordingly, yet *J. S.* held to take no interest by this will. II. 323

Where a devise is to *A.* for life, remainder to *B.*, and *A.* dies in the testator's lifetime, and then the testator dies, *B.* shall take presently. II. 331

If the devise had been to *A.* and *B.*, and *A.* had died in the testator's lifetime, *B.* should have taken the whole. *ibid.*

One devises to his wife six messuages for her life, the rest of his real estate equally to his two daughters in fee, after which on the marriage of his eldest daughter, he covenants to settle one moiety on her and her husband; the devise of the six houses shall be good, and subsist out of the remaining moiety. II. 333

Devise to *A.*, a Protestant for life, remainder to *B.*, a Papist for life; remainder to *C.* a Protestant; *A.* dies; *B.* being a Papist is disabled to take, and *C.* shall take presently in the same manner as if the remainder had been to a monk. II. 362

Devise of lands to *A.* for life, remainder to *B.*, a Papist for life, remainder to trustees for the life of *B.* in trust to let *B.* take the profits, and to preserve the contingent remainders; the trust to let *B.* the Papist take the profits is void, but that to preserve the contingent remainders good; and in this case the grantor and his heirs being Protestants shall have the profits during the life of the Papist, after whose death they shall go to *B.*'s son, being a Protestant. *ibid.*

Devise of 100*l.* in money, and 50*l. per ann.* to *A.* and his heirs, and if *A.* die without heirs, then to a charity; *A.* dies without issue, living the testator; the will void as to the whole, and the charity cannot take. II. 369

A. seised in fee has a son *B.* and a sister *C.*, and devises his lands to his son *B.* in tail general, and if his son *B.* should die without issue, and his wife should survive him, then the wife to have the premises for life, and after her decease to the testator's sister for life, and after her decease, the testator's son *being dead without issue as aforesaid*, remainder to *C.* in fee; *B.* the son dies without issue, but the testator's wife dies before him; *C.* is

not entitled to the remainder in fee, because the contingency of the testator's son dying without issue in the lifetime of the wife, is annexed to all the devises over. II. 390

If a devise be to executors of an equity of redemption only for payment of debts, this is but equitable assets, and to be applied to pay all sorts of creditors equally. II. 416

A. devised 10,000*l.* to trustees, in trust to be laid out in lands and settled on *B.* for life, without waste, remainder to trustees and their heirs for the life of *B.* to support contingent remainders, with a power to *B.*, to make a jointure, remainder to the heirs of the body of *B.*, remainders over; and by the same will devised lands to *B.* to the same uses, and died leaving *C.* executor; *B.* sues *C.*, the executor for the deeds relating to the lands that are in his hands, and to have the money laid out in lands and settled; decreed by the *Master of the Rolls*, that *B.* had but an estate for life in the lands, and so not entitled to the deeds: but that they were to be brought into court, and that the lands to be bought with the money were to be settled on *B.* for his life only, remainder to his first, &c. son. But by the opinion of Lord Chancellor *King*, *B.* was held to have an estate-tail in the lands devised, and consequently to be entitled to the deeds relating thereto; though as to the lands to be purchased, that being executory, and in the power of the court, *B.* was to be but tenant for life, with remainder to his first, &c. son. II. 471

One articles to buy certain lands, he thereby becomes seised of them in equity, but where *A.* devised all his real and personal estate, and afterwards articled to purchase lands, and then died; the heir at law was held to be entitled to this estate, as not passing by the will; *secus*, had the articles for a purchase been before the will, for then the estate would have passed. II. 629

One has two sons *A.* and *B.*, and three daughters, and devises his lands to be sold to pay his debts; and as to the money arising by sale after debts paid, he gives 200*l.* thereout to his eldest son *A.* at twenty-one, the residue to his younger children equally. *A.* the eldest dies before twenty-one; this 200*l.* shall go to the heir of the testator. III. 20

One being seised of lands in fee in *A.*, and possessed of an extended interest upon a statute in *B.*, devises all his lands, tenements, and real estate in *A.* and *B.* to *J. S.* and his heirs; this will not pass the extended or chattel interest in *B.*, especially if there be another clause in the will, which, *inter al'*, disposes of all the testator's debts or credits. III. 26

One possessed of a term for years, devises it to *A.* for life, remainder to the heirs of *A.* This shall, it seems, on *A.*'s death, go to his executor, and not to his heir. III. 29

A. has two sons *B.* and *C.*, and on the marriage of *B.*, *A.* settles part of his lands on *B.* in tail; and *A.* being also seised in fee of the reversion of these lands, and of other lands in possession, devises *all his lands and hereditaments not otherwise by him settled or disposed of;* the reversion in fee will pass. III. 56

One devises all his lands in *A.*, *B.*, and *C.*, and *elsewhere*. The testator has lands in *A.*, *B.*, and *C.*, and lands of much greater value in another county; the lands in the other county shall pass by the word *elsewhere*. III. 61

A will begins, "As to all my worldly "estate, my debts being first paid, I "give, &c." The real estate is liable to the debts, nothing being devised till the debts are paid. III. 91

In a devise of lands to pay debts, if the creditors bring a bill to compel a sale, the heir is generally to be made a party. III. 92

If I charge all my lands with payment of my debts, and devise part to *A.*, and the other part to *B.*, &c. The creditors cannot be paid out of the lands, till the master has certified what the proportion is, which each

devisee is to contribute; but if the master certifies, that the debts will exhaust the whole real estate, then the creditors may proceed against any one devisee for the whole. III. 98

One devises the surplus of his personal estate to his four executors; this is a joint bequest, and on the death of one shall go to the survivors, as well in the case of a legacy, as of a grant. III. 115

Devise of lands to trustees in fee, in trust within six years after the testator's death, to raise and pay 1500*l.* to his daughter *A.* *A.* dies within the six years; the 1500*l.* shall go to her administrator, here being no certain time limited when, but only the ultimate time within which, it shall be raised. III. 119

See also III. 172.

I devise 100*l.* *per ann.* to my son *A.*, and his wife for their respective lives; 60*l.* whereof to be paid to the wife for the support of herself and daughter, the remaining 40*l.* to my son; the son dies; his wife shall have the whole 100*l.* *per ann.* III. 121

Devise to such of the children of *A.* as shall be living at his death. *A.* has issue *B.*, who, becoming a bankrupt, gets his certificate allowed, after which *A.* dies; this contingent interest is liable to the bankruptcy. III. 132

Devise to my daughters until my son shall attain his age of forty years, hoping by that time my son will have seen his folly. The son dies before forty; the devise to the daughters ceases. So a devise to *A.*, until *B.* shall attain forty years; if *B.* dies before forty, *A.*'s estate shall cease; *secus*, if the devise to *A.* be made a fund to pay debts or portions, which cannot be raised until *B.* should have attained his age of forty, in which case the word *shall* is taken for *should.* III. 176

Devise to my son *A.* for life, remainder to his first son in tail male, remainder to his second, third, fourth, and fifth sons successively, without saying for what estate, or any words tantamount. *A.* has two sons, the former of whom dies in his life-time; the second son shall have an estate-tail, being the first son at his father's death. *Qu.* III. 178

One devises a rent-charge to be sold to pay legacies amounting to 800*l.*, and if the rent-charge should sell for 1000*l.*, the testator gives a further legacy of 200*l.* The rent-charge sells for above 800*l.*, and less than 1000*l.*, what exceeds the 800*l.* shall belong to the heir as a resulting trust. III. 252

Devise of a term to *A.* for life, remainder to such children as the testator shall leave at his death, and if all the children die without leaving issue then to *B.* The children die without leaving issue at their death; this is a good devise over. III. 258

The devise of a trust to be construed, in the same manner as that of a legal estate. III. 259

The words, "I devise all my temporal "estate," the same as, "I devise all "my worldly estate," and pass a fee. And this is the plainer, where it is afterwards said, all the rest of my real estate, the word *rest* being a term of relation. III. 295

The testator devised a term for years and all his personal estate to *A.*, an infant, and if *A.* died during his infancy, and his mother should die without any other child, then to *B.* *A.* died during his infancy; though the mother was living, and might have a child, yet the court aided *B.* the devisee over, by directing an account and discovery of the estate, in order to secure it, in case the contingency should happen. III. 300

A. devises all his real and personal estate to trustees, their heirs and executors, in trust to pay 15*l.* *per annum* to the plaintiffs his two sisters for their lives, and after several legacies, the surplus in trust for dissenting ministers, and gives 300*l.* legacies to his trustees. Afterwards the testator, by two deeds of a subsequent date, conveys all his real estate in trust,

and makes a gift of his personal estate to the use of the same trustees and their heirs, &c. Proviso both deeds to be void, on his tender of 10*s.* to them. There was also a proviso, that if the sisters disputed the will, they should forfeit their annuities. The testator after he had executed the deeds, still kept them by him. The trustees refuse paying the sisters their annuities, who thereupon bring their bill, insisting that the deeds had revoked the will; and that there was a resulting trust for them as heirs at law; or, at least, that they (the sisters) were entitled to their 15*l. per annum* annuities. The defendant insisted on the plaintiffs having forfeited their annuities; decreed, that the annuities should be paid to the two sisters the plaintiffs, but the surplus to go to the dissenting ministers, and the trustee, for his misbehaviour, to pay costs out of his own pocket.
III. 344, 347

See also EXPOSITION OF WORDS, TRUST *for raising Portions and Payment of Debts.*

Devises of Remainders over of Leases, Money, &c. See *Limitations of Terms for Years, Money, &c.* under title ESTATE.

Devise to a Charity. See CHARITY.

WITNESS.

In a suit to establish a former will, *A.* is examined by the plaintiff as a witness to prove the ill practices made use of in obtaining a latter will; after which, and before the hearing of the cause, *A.* has a rent-charge devised to him by the person claiming under the former will; the deposition of *A.*, who was disinterested at the time of the examination, but afterwards became interested and plaintiff in the cause, allowed to be read. I. 288

The surviving witness to a bond is made executor of the obligee; in an action brought by him on the bond, evidence shall be admitted to prove the plaintiff's hand. I, 289

A grantee, where he appears to be a bare trustee, good evidence to prove the execution of a deed to himself. I. 290

If a corporation would make use of one of their own members as a witness, they must disfranchise him. I. 596

A parishioner is no good witness to prove a charity given to the parish; *secus*, if only a lodger, and one who does not pay to the poor; but to be intended a house-keeper, and to pay, unless the contrary be made to appear. I. 600

A bankrupt's wife cannot be examined against her husband to prove his bankruptcy, though she may by 5 *Geo. cap.* 24. be examined touching the discovery of her husband's effects. I. 611

A witness ordered to be examined *de bene esse*, where the thing examined to, lay only in the knowledge of the witness, and was a matter of great importance, though the witness was not proved to be old or infirm. III. 77

A bare trustee is a good witness for his *cestui que trust*; but not an executor in trust, as he is liable to be sued by creditors, and to pay costs. III. 181

A commission being granted to examine witnesses at *Algiers*, the plaintiff died, by which the suit abated; but the witnesses were examined before notice of the plaintiff's death; the examination held regular, though one of the witnesses was living. III. 195

Witnesses examined in a commission after the demise of the crown, but before notice thereof, liable to be indicted for perjury, if they swear false. III. 196

See 1 *Annæ, stat.* 1. *cap.* 8. *sect.* 5.

A rule both at law and in equity, that where to a suit there are never so many defendants, if the plaintiff cannot give evidence against a defendant, he may be called as a witness for a co-defendant. III. 288

After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses in order to falsify the defendant's examination. III. 413
And see Evidence, Examination, Depositions, Will, *Witness to a.*

Bill to examine Witnesses in perpetuam rei memoriam.

A bill lies to perpetuate testimony, &c. before trial, on affidavit annexed that the plaintiff's witnesses are infirm and unable to travel. I. 117

WOMEN.

Women incapacitated from being witnesses to wills by the civil law. I. 11
And see Dower.

WORDS.

Words no evidence against a deed solemnly executed. I. 482
Where a title depends on the words of a will, this is as properly determinable in equity, as by a judge and jury at *nisi prius*. III. 296
And see Exposition of Words.

WRITINGS.

See Deeds.

WRITS.

In a prosecution of the Crown, though since the late statute of 4 & 5 *Ann.* the *venire facias*, which was awarded *de vicineto*, and not *de corpore comitatus*, was held good on account of the number of precedents. I. 223
Usual for the cursitors to *teste* original writs against hundreds and corporations, &c. the same day they are bespoke. I. 438
And see Process.

Certiorari.

After *in nullo est erratum* pleaded, the plaintiff in error cannot have a *certiorari ex debito justitiæ;* and as it is discretionary, the court will award it to affirm, but never to reverse a judgment, or make error. III. 315 (N)

Ejectione Custodiæ.

Qu. If not a proper writ whereby to try the very right of guardianship. III. 154 (N)

Elegit.

An advowson descending to an heir is real assets, and, as it seems, extendible in an *elegit.* III. 401

Error.

Writ of error not amendable, and why. III. 315 (N)
And see title Error.

Excommunicato Capiendo.

One who had been a prisoner in *Newgate* for debt, but since removed to the *Fleet*, is excommunicated; the Court of Chancery will not direct the cursitor to make out a writ of *excommunicato capiendo* to the warden of the *Fleet:* but the writ may be directed to the sheriff, who may return a *non est inventus*, and on this return, *B. R.* may grant a *habeas corpus*, and thereon charge him with an *excommunicato capiendo.* III. 53
The writ of *excommunicato capiendo* is a *viscountiel* writ: but where the sheriff is party, or otherwise incapacitated, it must be directed to the coroner. III. 55
All writs of *excommunicato capiendo* must be returnable in *B. R. ibid.*

Habeas Corpus and Homine Replegiando.

Qu. If these writs be not calculated only for the liberty of the subject, and therefore not so proper to try the right of guardianship, as that *de ejectione custodiæ.* III. 154 (N)

Ne exeat Regno.

A writ of *ne exeat regno* lies to prevent one's going to *Scotland;* and how the condition of the recognizance in such case must be worded. I. 263

This originally a state writ, yet now made use of in aid of the subjects, to help them to their just debts; but ought not to be granted without a bill first filed. III. 313

Yet see a precedent to the contrary. ibid. (N)

How far the Lord *Bacon* thought proper to extend this writ. *ibid.* (N)

Original.

The court will not order the filing an original to make good a judgment after error brought, without some excuse for not filing one before. III. 314

Ravishment of Ward.

Qu. If this writ be proper, unless where the defendant in the action takes away the ward. III. 154 (N)

Scire Facias.

A bill of revivor after a decree to account, is in nature of a *scire facias* on a judgment, and not within the statute of limitations. I. 742

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